88-1164

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

SPECTRON BROADCASTING CORP.
PETITIONERS,

v.

FEDERAL COMMUNICATIONS COMMISSION,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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202-862-1047

QUESTIONS PRESENTED

1. Whether or not the Federal Communications Commission's failure to award an "enhancement credit", for the participation of local, civic leader: broadcast ownership (that in addition was female and minority) was arbitrary and capricious?

A. Whether the Federal Communications Commission's action to abandon the analysis of the facts of this credit in the context of its "localism" (47 U.S.C. 307(b)) goals and in the context of the federal laws seeking affirmative action regarding minority enterprise (Fullilove v. Klutznick, 448 U.S. 448 (1980)) was a clear error in judgment? (Motor Vehicle Manufacturer's Assoc. v. State Farm Mutual Auto Co., 463 U.S. 29, 77 L.Ed.2d 443, 103 S.Ct. 2856 (1983).

2. Whether or not the Federal Communications Commission's use of the evidence of Spectron's "enhancement credit

proposal", exclusively in the context of diminishing its quantitative integration of ownership and management award was arbitrary and capricious?

A. Whether the application of the "actual control test" within the context of quantitative integration credit, solely for evaluating minority and female broadcast applicants, evidences a pattern of invidious discrimination in contravention of federal law and as such constitutes an abuse of agency discretion? Yick Wo. v. Hopkins, 118 U.S. 356 (1886).

B. Whether the facts of this case indicate that the application of this "actual control test" was done in such a manner as to deny Spectron due process of law?

TABLE OF CONTENTS

	Page
Opinions below	6
Jurisdiction	6
Constitutional and statutory provisions involved	6
Statement	8
Reasons for granting the petition	16
Conclusion	26
Appendix A	1a
Appendix B	156a
Appendix C	241a
Appendix D	248a
Appendix E	262a

TABLE OF AUTHORITIES

Cases:

Fullilove v. Klutznick, 448 U.S. 448 (1980).,.....2, 18

Motor Vehicle Manufacturer's Association v. State Farm Mut., 463 U.S. 29, 77 L. Ed.2d 443, 103 S. Ct. 2856 (1983)....2, 19

TV-9, Inc. v. FCC, 495 F.2d 929 (D.C. Cir. 1973), cert. denied 419 U.S. 986 (1974)..19

Wygant v. Jackson Board of Education, 106 S.Ct. 1842 (1986).,.....10

Yick Wo. v. Hopkins, 118 U.S. 356 (1886)..3, 9,

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A writ of certiorari is respectfully sought to review Judgment of the United States Court of Appeals for the D.C. Circuit entered September 29, 1988. This is petitioner's, Spectron Broadcasting Corp.'s (hereinafter referred to as "Spectron"), original designation of corporate relationships. Spectron is not owned by any parent corporation. Spectron does not have an

ownership interest in any subsidiaries. Spectron does not have any affiliates.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the D.C. Circuit is unreported. The memorandum setting forth the reasons for their affirming the FCC's decision is printed in Appendix E.

JURISDICTION

The judgment of the U.S. Court of Appeals for the D.C. Circuit was entered on September 29, 1988. (Appendix E) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part:

> "No person shall... be deprived of life, liberty, or property, without due process of law..."

2. The Fourteenth Amendment to the United States constitution provides in relevant part:

> "No State shall... deny to any person within its jurisdiction the equal protection of the laws."

4. 47 U.S.C. 309(d) provides in relevant part:

> "... The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a) of this section"....

3. 47 U.S.C. 307(b) provides in relevant part:

> "... the Commission shall make such distribution of licenses... among the... communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

STATEMENT OF THE CASE

On its face this case appears to be another routine challenge of an administrative agency's disposition of two mutually exclusive broadcast applications for a Long Island radio station.

However, there are more than the prospective property rights of a slighted broadcast applicant in this case. There has been a "taking" of actual (not prospective) broadcast property rights - rights relinquished in reliance on the agency's orders in this case. St. Augustine's College in Raleigh, North Carolina currently operates a television station through the donation of this broadcast licensing right from the alleged "non-controlling" minority-female applicant herein. Compliance with this agency's divestiture requirement amounted to a "taking". The courts have recognized the distinction in the protection of prospective property rights and the protection of vested

property rights, in their decisions to grant judicial relief.

Caught within the throes of uncertainty as the agency seeks to deregulate its industry, the issues go beyond whether the agency's actions herein were arbitrary and capricious. Beyond forsaking the public's rights to the airwaves for the rights of industry[1] to higher profits and more favorable financial marketability of the airwaves, the FCC's actions show a pattern of indivious discrimination. Yick Wo. v. Hopkins, 118 U.S. 356 (1886).

1. See Fowler & Brenner, A Marketplace Approach to Broadcast Regulation, 60 Tex.L.Rev. 207 (1982), Hagelin & Wimmer, Broadcast Deregulation and the Administrative Responsibility to Monitor Policy Change 38 Federal Communications Law Journal 201 (1986).

The Supreme Court has never granted certiorari on the issue of the FCC's violations of the Civil Rights laws or the agency's failure to enforce affirmative action in the broadcast industry. In the aftermath of Wygant v. Jackson Board of Education, 106 S.Ct. 1842 (1986) it is imperative that this be done. Just as in the Yick Wo. v. Hopkins, 118 U.S. 356 (1886) case decided over one-hundred years ago, this Court is faced with a law (rule of policy) which on its face may seem fair and impartial, but is in fact being administered discriminatorily. In the Yick case a statue required all launderies to be houses in stone structures. Inasmuch as all the Chinese launderies were housed in wooden structures, 100% of the Chinese were violators and their launderies were closed. Similarly, in every broadcast case that has been researched, where applicants were denied licensing authority on the basis of the "actual control test" in the integration

evaluation, every applicant had either a woman or a minority that failed the test.[2]

Diminished integration credit under that "actual control test" has never been imposed where the entity in question does not have either female or minority owners in management. Just as in the Yick case the effect of this agency conduct is discrimation. By invoking this abbreviated, "irrebuttable presumption" policy of female and minority weakness within the context of an obscure administrative agency sub-policy, members of these groups are denied due process and equal protection of the law.,

If the agency wants to address the issue of "actual control" there are any number of traditional mechanisms with which to do so (such as fraud, misrepresentation, real party in interest findings).

2. See (Adelphi Corp. - females and minorities Signal Ministries 104 FCC2d 1482 (1986)) 2. (East lake Communications, Inc. - minorities RKO General, Inc. - WFYR-FM,

Moveover, precisely because of the pattern of racial and gender discrimination in the broadcast industry, Spectron decided upon its present corporate configuration. Government statistics continue to show minority and female ownership of broadcast properties well below 2%. Industry statistics show the number of minorites employed in broadcast management to be declining over the past ten years.

2FCCRcd 2839 (1987)) 3. (Greater Memphis Communications, Ltd. - minority - RKO General - WHBQ - TV 2 FCCRcd 4111 (1987)) 4. (Coast TV - females and minorities Coast TV 2FCCRcd 2982 (1987)) 5. (EBC - minorities, EVI - females and minotities, Best Evergreen - females - Payne Communication, Inc., 1FCC Rcd 1052 (1986)). 6. (Quality - females and minorities - RKO General - WGMS 2 FCCRcd 3757 (1987)). 7. (Washoe Shoshene - females; RET - females. Washoe Shoshone Broadcasting 2FCCRcd 5362 (1987)). 8. (Victory, Inc. - female and minority. Victory Media, Inc., 2FCCRcd 1759 (1987)). 9. (Head Hog - minority. Elijah Broadcasting Corporation 2FCCRcd 4468 (1987)). 10. (New Life, Inc. - female - Priscilla Schweir 2FCCRcd 7153 (1987)).

Founded by the nation's first black and female legal adviser to an FCC Commissioner, Spectron seeks to increase both the amount of local, civic and educational input into broadcast ownership and involvement and the amount of female and minority input. By urging a type of "enhancement credit" which was specifically not restricted to "integration" analysis it sought to meet these goals.

The credit would assure some incentive to include local civic leaders, (such as university, presidents, presidents of Lions Club, Girl Scout chapters, etc.) as well as minorities and females without the experience or the inclination to become either professional broadcast entrepreneurs or broadcast managers. As deregulation places more and more emphasis on commercialism, there is a greater need to insure that the "non-entertainment" messages and messengers in our

communities have some accountability in the use of this public's resource.

Spectron has two classification of equity holders. Not all of their equity holders propose to serve the station. Only those equity holders who are local will serve. In the community service and programming areas, only those otherwise "financially passive" equity holders, who happen to be local civic leaders will serve as advisers on less than a part-time basis.

To discredit this effort is not only injurious to Spectron, but it unjustifiably narrows the incentives to involve local civic leaders in station ownership. Since females and minorities occupy a disproportionately higher percentage of the leadership roles in civic - volunteer organizations (a much greater percentage than they occupy of broadcast management and financial leadership roles) the FCC's action is particularly deplorable.

The FCC has never explained its refusal to consider this proposal. While providing affirmative action for minorites and females, indirectly, the proposal directly furthers the congressisonal goal of "localism" in broadcasting. The FCC elected to ignore this proposal and to use certain of the facts of this proposal to fit under their "actual control" test.

When the court combines these three elements: 1. The discriminatory application of the "actual control" test to minorites and females exclusively. 2. The deliberate failure to consider the "enhancement credit" proposal especialy as an act of affirmative action. and 3. the grave statistical disparities that persist between black and white, female and male, ownership and management of the broadcast industry, the

court should grant certiorari in order to halt this "identified discrimination." Fullilove, supra.

REASONS FOR GRANTING THE PETITION

CERTIORARI SHOULD BE GRANTED IN ORDER TO CLARIFY THE PARAMETERS OF THE FCC'S DISCRETION IN REGARD TO BOTH SUBSTANTIVE AND PROCEDUREAL MATTERS OF DEREGULATION

I. The issue is not whether the FCC can depart from a prior policy on crediting integration proposals. The issue is not whether the FCC can adopt a new "actual control test" whereby it looks beyond a corporation's legal structure in crediting its integration proposal. The issue is whether the FCC is manipulating the context of the integration standard, in order to insulate itself from a higher burden of proof and a more rigid standard of due process which would have otherwise been required. Stated in a more concise fashion the issue is whether the agency is discriminatorily and illegally mimicking those court actions which place matters in the context of juvenile actions, mentally incompetent actions, domestic

relations actions, in order to avoid the constitutional safeguards and protections of due process in regular adult criminal actions. This is the issue on the procedural matter in deregulation. The FCC should not be allowed the discretion to create a separate sub-system of due process applicable only to females and minorities, equating their rights with those of the mentally incompetent and juveniles. Such agency discretion is not merely patrtonizing and condescending, but unconstitutional.

II. Turning to the substantive matters, in their deregulatory zeal, both the FCC and the Court of Appeals are blinded by their interest in marketplace regulation. Page one of the Court's memorandum, reads, in part: "Partially in recognition of the difficulty of financing a license application and station, the Commission excludes truly passive investors from its integration calculation." This deference to the broadcast

industry's need for ease of financeability is not one of the goals required by the Communications Act of 1934 for the agency to pursue. It is disturbing that the only goal which the Court offers in justification for the FCC's action is to maintain the financial prosperity of the industry. The congressional goals of "localism" and "diversity of view point" have been relegated to the back seat of this train.

While "localism" may be purely a broadcasting concept, limited exclusively to FCC discretion as to enforcement, affirmative action is a state and federal concept broadly and integrally a part of the intent and goals of the U.S. Constitution. In Fullilove v. Klutznick, 448 U.S. 448 (1980) this Court established the constitutionality of congressionally mandated preferences for minority businesses in federal government contracting and spending. Specifically, in regard to minority ownership of broadcast

stations the Circuit Court held in TV 9, Inc. v. FCC, 495 F.2d 929 (1973) that: "When minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded." In his supplemental opinion, Senior Circuit Judge Fahy stated the reasons why "unintegrated" but substantial minority ownership advances the cause of diversity of viewpoints at p. 942:

> "Black persons having substantial identification with minority rights will be able to translate their positions, though not technically "managerial" and their ownership stake, into meaningful effects on this aspect of station programing."

This Court in Motor Vehicle Manufacturers Association v. State Farm Mutual, 103 S.Ct. 2856 (1983) has specifically set out a "hard look" test as the standard for its scope of review in deregulatory, cases in which the agency abruptly departs from prior judicial and congressional law. Reviewing the agency's industry financeability justification for its action and its callous disregard for

either the role of "localism" or increased minority ownership the agency has demonstrated a "clear error in its judgment". Wall Street, congress and the public recognize the financial prosperity of this industry. Similarly, these institutions have recognized the dearth of ownership in this industry by minorities and women, (less than 2%). While ignoring an area in which remedial action has been mandated, the FCC seeks to remedy a financeability and industry marketability problem that has never been identified as such and is indeed non-existent.

III. Due process should be a neutral principal of administrative law which should rise above the substantive debates over broadcast deregulation. However, in Spectron's case due process has become just as much the victim of deregulation as have many of the aforementioned substantive legislative goals of the Congress. For example, compare the due process safeguards attached to the

FCC's imposition of a studio location issue on Spectron. Evidence was offered contesting the location of the stations' studios outside its city of license. In its defense Spectron provided evidence that these studios were currently being used to operate the station-as they had been for over 14 years. Not satisfied or convinced that this rational for Spectron's proposal would assure the congressional goal of "broadcast localism", an additional issue was added by the FCC against Spectron.

While Spectron met its burden of proof on this issue, and the station's license was initially awarded to Spectron, (See Appendix A), the FCC nonetheless abandoned its entire studio location restrictions within less than 2 years later. Thus, what was apparently a minor mechanism in insuring a much larger congressional goal of protecting broadcast localism, nonetheless was accorded the dignity of due process. Spectron's eleven

opponents met their burden of offering a prima facie showing on the studio issue. 42 U.S.C. 309(d). Following Spectron's unconvincing rebuttal, the FCC put Spectron on notice that the burden of proof had shifted for it to prove its compliance with the goals of the '34 Act.

In sharp contrast to the agency's treatment of the studio location matter, it took an equally strong legislative goal of ascertaining the real parties in interest in broadcast licenses and followed a completely different procedure. The Court of Appeals in partnership with the FCC accepts counsel's post hoc rationalization that Spectron's integration proposal had been contested. At page 8 of their decision they write: "... Because in Greater Wichita the formal corporate structure was not belied by who actually controlled the applicant and did not shield a contested integration proposal..." Having just done so, the FCC was certainly

familiar with finding prima facie showings of violations of its rules. Where the truth of matters that could undermine their policies and goals was in question they were accustomed to the procedure of setting issues for hearing. The FCC had done this regarding the studio issue. However, on not less than five separate occasions[3] the FCC specifically refused to set an issue of "actual control" against Spectron. On precisely the same record that was before the agency and is now before the Court, the Agency could not even be convinced that there was a prima facie showing of a material question of fact on this "actual control" issue. Spectron rebutted, its opponent's requests and each time the FCC declined to find that a prima facie showing had been made and thus refused to impose an issue against Spectron.

In order to justify the reversal of its initial grant, the FCC resorted to another post hoc rationalization. (See Appendix B &

C). It adopted and applied retroactively, what amounts to an irrebuttable presumption that non-voting stockholders' board of directors memberships will impair the "actual control" of voting stockholders. As a consequence, integration of ownership and management proposals, based upon voting stock interests, must be discredited, accordingly. For a matter so vital to the integrity of our nation's broadcasting system, - there is no finding of fraud; - there is no finding of any real party in interest - but rather, there is an "actual control presumption". Deregulation is silencing the substantive issue and slaughtering due process.

In response to Spectron's request to enlarge issues against Jarad, the FCC wrote on June 10, 1985: "The motion was denied because Rule 1.229(d) requires that petitions contain specific allegations of fact sufficient to support the action requested. This means that proponents of motions to enlarge issues must

set out a prima facie case." The court should require the FCC to explain why it elected to circumvent its own rules and pronouncements only on the issue of the "actual control" matter. The agency's departure from its due process procedures contravene constitutional safeguards.

3. (1) On August 13, 1984 the FCC declined to add a financial issue against Spectron, holding that "Hempstead has failed to demonstrate in accordance with Section 1.229 of the Rules that Spectron's certification was not based on bona fide financial commitments."

(2) On August 21, 1984 the FCC denied a request that Spectron produce documents relating to whether its "de jure" principals also exercise "de facto control" because such "documents do not relate to any issue designated against Spectron".

(3) Another decision of the FCC on August 21, 1984 denied Jarad its request to attach an issue to the voting/non-voting configuration of Spectron: "No inconsistency as to Spectron's ownership is perceived. Spectron has clearly indicated its voting and non-voting shareholders as well as their respective percentages of ownership."

(4) On September 10, 1984, Jarad sought to test whether "Spectron's distribution of stock does in fact accord Angela Shaw 100% control over Spectron. "In denying Jarad's request, the FCC reiterated that "Spectron's stock structure has been

clearly set out. Jarad's "confusion" as to whether Spectron's non-voting stock is also voting stock and vice-versa is deemed to be a ruse to engage in a fishing expedition."

(5) On October 22, 1984, Jarad's renewed request to impugne Spectron's corporate integrity was denied. "The fact is that the Secretary of the Spectron corporation certified that the resolution was adopted March 18, 1983." (This is well before the "B" cut-off and clearly anything but "eleventh-hour" as the Court of Appeals writes at p.4 of its memorandum).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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PROOF OF SERVICE-AFFIDAVIT

I, ANGELA SHAW, one of the attorneys for Spectron Broadcasting Corp., petitioner herein, hereby certify that, on the 27th day of December, 1988, I served copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia, on the several parties thereto as follows:

1. On the Federal Communications Commission, but mailing a copy, in a duly addressed envelope, with air mail postage prepaid to Daniel Armstrong, Esq., its Chief Counsel, at the offices of the Commission, 1919 M Street, Washington, D.C. 20054.

2. On Jarad Broadcasting, intervenor by mailing copies in duly addressed envelopes, with first class postage prepaid, to their attorney of record, Lewis J. Paper, Keck,

Mahin & Cate, 1730 Pennsylvania Ave, N.W.,

Washington, D.C. 20006-4706.

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Subscribed and sworn to before me at this
23 day of December, 1988.

Notary Public

JOHN R CONROY
NOTARY PUBLIC, State of New York
No 4839993
Qualified in Nassau County
Commission Expires ~~March~~ 30, 1989

APPENDIX B

Before the

Federal Communications Commission

Washington, D.C. 20554

In re Applications of	)	
	)	
JARAD BROADCASTING	)	
COMPANY, INC.	)	MM DOCKET NO. 84-301
Garden City, New York	)	File No. BPH-830325AC
	)	
SPECTRON BROADCASTING	)	
CORPORATION	)	MM DOCKET NO. 84-303
Garden City, New York	)	File No. BPH-830516AK
	)	
GARDEN CITY	)	
BROADCASTING, INC.	)	MM DOCKET NO. 84-304
Garden City, New York	)	File No. BPH-830713AQ
	)	
WESTPLEX BROADCASTING	)	
COMPANY	)	MM DOCKET NO. 84-305
Garden City, New York	)	File No. BPH-830714AE
	)	

NORTH SHORE	)	
BROADCASTING	)	MM DOCKET NO. 84-306
Garden City, New York	)	File No. BPH-830714AF
	)	
DECEMBER VENTURES,	)	
INC.	)	MM DOCKET NO. 84-307
Garden City, New York	)	File No. BPH-830714AG
	)	
WINK RADIO, INC.	)	MM DOCKET NO. 84-308
Garden City, New York	)	File No. BPH-830714AH
	)	
FONIC BROADCASTING CO.	)	MM DOCKET NO. 84-309
Garden City, New York	)	File No. BPH-830714AI
	)	
MID-ISLAND	)	
BROADCASTING, INC.	)	MM DOCKET NO. 84-310
Garden City, New York	)	File No. BPH-830714AK
	)	
McCOMAS BROADCASTING	)	
CORPORATION	)	MM DOCKET NO. 84-312
Garden City, New York	)	File No. BPH-830714BF
For Construction Permit	)	
for a New FM Station	)	

Appearances

Lewis J. Paper and Charles B. Molster, III, on behalf of Jarad Broadcasting Company, Inc.: Robyn G. Nietert and Angela V. Shaw on behalf of Spectron Broadcasting Corporation: Dennis J. Kelly and Alfred C. Cordon on behalf of Garden City Broadcasting, Inc.; Howard M. Liberman and Nora E. Garrote, on behalf of Westplex Broadcasting Company; Allen J. Rothman and Jessel Rothman, on behalf of North Shore Broadcasting: Richard S. Robin and Marissa G. Repp on behalf of December Ventures, Inc.: William R. Richardson, Jr., on behalf of WINK Radio, Inc.; George Mamos, on behalf of Fonic Broadcasting Co.; and Jerome S. Silber, on behalf of McComas Broadcasting Corporation.

DECISION

Adopted: September 30, 1986

Released: October 16, 1986

By the Review Board: MARINO (Chairman), JACOBS ESBENSEN.

Board Member ESBENSEN

1. This proceeding involves the nine mutually exclusive applications of Jarad Broadcasting Company, Inc. (Jarad), Spectron Broadcasting Corporation (Spectron), Garden City Broadcasting, Inc. (GCB). Westplex Broadcasting Company (Westplex), North Shore Broadcasting (NSB). December Ventures, Inc. (DVI). WINK Radio, Inc. (WINK), Fonic Broadcasting Co. (Fonic), and McComas Broadcasting Corporation (McComas) for permanent authority to construct an FM broadcast station to operate on Channel 224 at Garden City, New York, to replace the deleted facilities of Station WLIR(FM).[1] By

Hearing Designation Order (HDO), 49 Fed. Reg. 15132, published April 17, 1984, these applications were designated for consolidated hearing[2] on the standard comparative issue including a comparison of the applicants' respective coverage of areas and populations. By Memorandum Opinion and Order, FCC 84M-2853, released June 25, 1984, presiding Administrative Law Judge John M. Frysiak (ALJ) added an issue to determine whether Spectron had good cause for locating its proposed main studio outside the principal community to be served and, if so, whether it would be consistent with the public interest.

2. In his Initial Decision (I.D.), FCC 86D-13, released March 4, 1986 the ALJ first resolved the main studio issue in favor of Spectron, I.D., para 166, and then ultimately concluded that Spectron was comparatively the best applicant, id.at para. 206. In reaching this determination,

the ALJ assessed comparative demerits under the comparative factor of diversification of mass media control to Westplex, NSB, DVI and McComas: and concluded that under the factor of integration of ownership and management: (1) DVI (with 100% part-time credit) and Fonic (76% full-time credit) were decisionally inferior to the 100% full-time proposals of Jarad, Spectron, GCB, Westplex, NSB, WINK and McComas: and (2) Spectron, with 100% qualitative enhancement credits for local residence, civic participation, minority and female ownership, and limited broadcast experience, edged out Jarad and Westplex, the qualitatively closest applicants. Id.at paras. 204-206. He also concluded that no applicant should receive a comparative coverage preference, despite WINK's proposal to serve substantially larger--but already well-served areas and populations. Id. at para. 167.

3. This proceeding is now before the

Review Board on exceptions filed by the parties. We have reviewed the I.D. in light of the exceptions and reply briefs, the oral argument held July 3, 1986, and the underlying record. Except as discussion herein, we adopt the findings of fact and conclusions of law in the I.D. However, as we discuss herein, we reverse the ALJ's conclusion that Spectron is the comparatively superior applicant, and conclude instead that a grant of Jarad's application will best serve the public interest.

4. Jarad. The ALJ credited Jarad with 100% full-time credit for the proposed integration of its sole principal. Ronald Morey, as general manager of the proposed station, qualitatively enhanced by his residence within the proposed service area since 1977, his civic activities, and his broadcast experience. The ALJ also credited Jarad with 100% minority ownership

enhancement credit for Mr. Morrey's alleged status as a Native American. He also concluded that neither Jarad nor Mr. Morey had any attributable mass media ownership interests. I.D., paras. 12-18, 168. Exceptions have been filed which assert that: (1) Jarad should be charged with a diversification demerit because Mr. Morey owns a "voice over" business which is utilized "by advertising agencies in the sale of commercials to both radio and television stations" (NSB Br. at 26); (2) Mr. Morey's "voice over" business will prevent him from effectuating his 100% full-time integration commitment to the proposed station (Spectron Br. at 10-11; GCB Br. at 26-27; and NSB Br. at 28-29); and (3) Mr. Morey is not entitled to his claimed minority status (Spectron Br. at 2-8; GCB Br. at 20-26; Westplex Br. at 40-41; NSB Br. at 30-34; WINK Br. at 27-33; and McComas Br. at 9-10).

5. We first address NSB's challenge to Jarad's diversification posture. NSB claims that Mr. Morey's "[s]imultaneous ownership of Jarad and R. J. Morey, Inc. [the 'voice over' business] ... creates the risk that Mr. Morey would ... gear Jarad's programming and advertising to satisfy R. J. Morey, Inc.'s national clients rather than the interest of the local community" and that "he will be beholden to the advertisers and agencies which compensate him so handsomely for his voice-over services." NSB Br. at 27-28. However, the hearing record reveals NSB's expressed concerns to be purely speculative and fanciful. Moreover, common sense in the day-to-day operation of a broadcast facility (where the income to the station will depend on hundreds of different advertisers) dictates that NSB's arguments are preposterous. R. J. Morey, Inc. contracts with advertising agencies to perform "voice overs," i.e.,

announcing, in producing commercials, but has no role whatsoever in selecting the content of the commercials or the stations over which they will be aired. Tr. 91-97, 188-189. Consequently, this business has far less possible impact upon the Commission's diversification objectives of "maximizing available program services and viewpoints and preventing any undue concentration of economic power contrary to the public interest" than advertising firms, which are not themselves media of mass communciations and which have only a remote potential for media concentration or conflict of interest. See Jerome Thomas Lamprecht. 99 FCC 2d 1219, 1221 (Rev. Bd. 1984).

6. Next, we have considered the attack on Jarad's ability to effectuate Mr. More's full-time station management commitment and have found it equally wanting in merit. The exceptors essentially point

to Mr. Morey's great success in the "voice over" business and a 1980 press interview (held 3 years before the Jarad application was filed) in which he stated that he had no intention to "forsake his commercial career" (Tr. 99) and speculate that he will not be able to devote the 40-hours per week to station management requisite for full-time credit. However, Mr. More's present intentions were made clear on the record. He stated that he is "prepared to completely abandon [his] present career as a free lance announcer to fulfill [his] commitment as the general manager of the station." Jarad Exh. 1 at 5. On cross-examination, he steadfastly affirmed this pledge to reduce his time commitment to free-lance announcing, including totally abandoning that career if needed, in order to manage the proposed station. Tr. 99-105, 116. The corporate work for R. J. Morey, Inc. is handled by an accounting firm and a

bookkeeper, and the corporation would continue to receive payments for commercials which were made previously but which continue to run. Tr. 187-88. In short, Mr. Morey's plan to assure his ability to effectuate his proposal is uncontradicted by any record evidence and is credible; we therefore affirm the ALJ's award of 100% full-time credit to Jarad. See Central Texas Broadcasting Co., Ltd., 90 FCC 2d 583, 586 (Rev. Bd. 1982) (subsequent history omitted).[3]

7. With respect to the challenges concerning Mr. Morey's claimed minority status as an American Indian we initially note the Commission's recently-enunciated position in its Brief filed September 12, 1986, before the United States Court of Appeals for the District of Columbia Circuit in Janes U. Steel v. FCC No. 84-1176 (D.C. Cir.) (rehearing en banc). Therein, the Commission has succinctly declared that, in

light of the Supreme Court's opinion in Wygant v. Jackson Bd. of Educ., U.S., 90 L.Ed.2d 260 (1986), its current policy of awarding comparative preferences for integrated minority and female owner-applicants may be unconstitutional and unauthorized by the Communications Act. Nevertheless, in light of the posture of this proceeding, and the heavy reliance placed upon minority and female preferences by the applicants herein, we have fully reviewed this comparative consideration in reaching our decision. However, as will be shown, these claimed preferences are non-decisional in any event, and absent any minority preferences Jarad's winning margin would only be further widened. Specifically, Jarad (even prior to the filing of the Commission's Brief in Steel, supra) would not be entitled to any minority preference. We begin our supporting analysis by pointing out that in its

STatement of Policy on Minority Ownership of Broadcasting Facilities, 68 FCC 2d 979 (1978), the Commission observed that the views of racial minorities were underrepresented in the broadcast media and that these minorities included American Indians. Id. at n. 8. The Commission's Annual Employment Report, Form 395, provides for reporting American Indians whenever such persons are employed (see FCC Form 395-EEO, 70 FCC 2d 1466 (1979)), and our rules require that equal employment opportunities be provided for American Indians and other minorities. Section 73.2080(c).

8. The instructions to Form 395 define an "American Indian or Alaskan Native" as "a person having origins in any of the original peoples of North America and who maintains cultural identification through tribal affiliation or community recognition." While several exceptors challenge this definition as being too broad

and suggest, for example, that actual tribal membership should be required (GCB Br. at 24: Westplex Br. at 41, n. 11; NSB Br. at 31), we are satisfied that this definition, taken direction from the Commission's actual employment guidelines to applicants, is appropriate. See also Buckley Broadcasting Corp., 72 FCC 2d 326 (1979). Applying this definition, however, we do not believe Jarad has, in fact, established that Morey is an American Indian.

9. Morey grew up in Brantford, Ontario, Canada, a community which was named after Indian Chief Joseph Brand. Jarad Exh. 1, p. 1. Morey testified that his father told him he (the father) was a descendant of Chief Brant of the Sixth Nation's Reserve as a result of one of Brant's daughters marrying a Morey. Tr. 144. Neither he nor his father is registered on the tribal rolls because neither lives on or participates in the activities of the reserve. Tr. 158.

Morey claims affiliation with the Mohawk tribe only because his father is a Mohawk. Tr. 157. His mother is not an American Indian. Tr. 144. He has never lived on the Sixth Nation's Reserve and does not know if anyone on the reserve would know who he is. Tr. 154. He testified that he is "recognized" in his residential and professional communities as an Indian, but conceded that this recognition is based simply on his telling people that he is an Indian. Tr. 154-6.

10. In short, Jarad's claim that Morey has origins and maintains cultural identification as an Indian through tribal affiliation or community recognition is based solely on what he has told others or what his father told him. Jarad did not substantiate this claim through any form of documentation such as a birth certificate, tribal records, certification by a government agency, or other written evidence

of geneology. Because Jarad's entitlement to minority credit was not self-evident, its claim was challenged at the hearing and we believe Jarad had the burden of coming forth with something more than Mr. Morey's memory and belief to support its claim. We do not hold that the record establishes that Morey is not an Indian but only that it does not establish that he is an Indian. Clearly, it was Jarad's burden, as the applicant seeking credit, to authenticate its claim, when challenged, with specific and persuasive evidence.[4] Since it did not do so, Jarad will not be awarded minority enhancement credit.

11. Spectron. The ALJ credited Spectron with 100% full-time credit for the proposed integration of its sole voting stockholder (31 shares), Angela Shaw, as general manager of the proposed station, qualitatively enhanced by her past and future service area residence, her prior

civic activities, and past broadcast experience, as well as by her status as a black and female owner who will participate in station management. Neither Spectron nor Ms. Shaw has any attributable mass media ownership interests. I.D., paras. 20-33, 169. The ALJ found that on March 18, 1983, Spectron created two classes of stock, voting and non-voting, and that Spectron has the following non-voting stockholders: Angela Shaw (owning 18 of 64 non-voting shares issued and outstanding), Roland H. Davis (22 shares), Briding Newell (15 shares), Frances Hooks (5 shares), James M. Shuart (2 shares), and LuNell Anderson (2 shares). Id., paras. 24-25. The ALJ found that Mr. Davis will devote from 10 to 20 hours each week to the proposed station, including serving on three policy committees: The Editorial Policy Committee. The Community Affairs Committee, and The Programming Committee. Id., para. 29. Ms.

Newell will also serve on these committees and will devote approximately 10 hours per week to the station. Id., para. 30. Mr. Shuart, the president of Hofstra University, will serve on the committees, but no time commitment to the station was specified for him. Id., para. 31.

12. In addition, as a result of an agreement entered into with Spectron on or about May 23, 1983. Francesco Galesi, in exchange for his financial support, acquired an option to purchase 10 shares of Spectron stock and a right of first refusal to purchase up to 51 additional shares of Spectron stock. Although the agreement did not specify whether Galesi's stock option was for voting or non voting stock, the ALJ found that the intent of the parties was to make available to Mr. Galesi only non-voting stock. Id., n. 8. Mr. Galesi's rights to acquire stock were subsequently assigned to his wife, Marina Wolkonsky, Id., para. 26.

13. Various exceptions challenge the ALJ's award of 100% quantitative integration credit to Spectron based on the untimely amending of its certificate of incorporation to authorize the issuance of non-voting stock.[5] The active role in station management and policy-making of certain of its non-voting stockholders, the Galesi-Wolkonsky loan agreement (which at one point allgedly contemplated for issuance of voting stock to Mr. Galesi in return for certain financing guarantees), and the lack of credibility of Shaw's integration proposal due to her many errors made in testifying upon cross-examination about Spectron's corporate structure and records. Jarad Br. at 3-19; GCB Br. at 9-17; Westplex Br. at 21-29; North Shore Br. at 14-18, 21-24; DVI Br. at 22-29; WINK Br. at 17-21; and Fonic Br. at 3. Spectron responds that under New York State law it is a validly-formed corporation with two classes

of stock, its voting class being solely owned by Ms. Shaw. Reply at 4-9. It claims that Ms. Shaw is, in fact, in "total control of Spectron." Id. at 9. Finally, it urges that Mr. Galesi and Ms. Wolkonsky "have not exercised any control whatsoever upon Spectron." Id. at 10.

14. We agree with the exceptors that various factors deprive Spectron of the full quantitative integration credit it seeks. First, although Angela Shaw is Spectron's putative 100% sole voting stockholder, her cross-examination on October 23-24, 1984 revealed both her lack of knowledge and her passivity concerning many significant aspects of the Spectron application. For example, Ms. Shaw (an attorney formerly employed by the Federal Communications Commission) initially testified that she thought she owned forty shares of voting stock which were authorized to be issued to her at the March 18, 1983 board of

directors/stockholders meetings. Tr. 405, 416-417. However, she was not certain because Spectron's local counsel "took care of that." Tr. 417. Each share of stock cost $1, and she testified she paid $40 for her stock. Tr. 418. She did not know how Spectron decided to allocate "voting" and "non-voting" shares among the stockholders because "the lawyer decides." Tr. 418-419. She was only interested in the "percentage" of shares that she and the other stockholders would own and "not the number of shares," because "you can always change the numbers." Tr. 419. She also thought she had been issued some non-voting shares at the initial board meeting. Tr. 405, 437. She claimed that, as indicated in the application as originally filed on May 16, 1983, she owned 46.7% of the equity, but did not know what that percentage was based upon. Tr. 428; see Jarad Ex. 6.

15. Although this former Commission

attorney certified the application as being accurate and complete, she did not verify it from personal knowledge but instead relied totally upon her attorneys. Tr. 428. She was not concerned that the application as originally filed did not list any non=voting stock that she claimed she owned because she "trusted the lawyers" and because she regarded it as an unimportant technical matter, just as long as "the percentages stayed the same." Tr. 438. After initially assuming that both classes of Spectron stock were "equity," she changed her opinion and thought that only the non-voting stock represented equity. Tr. 424, 435. Although it became clear on cross-examination that the number of shares and percentage ownership of shares did not add up properly, she strongly denied that the missing shares reflected ten shares of stock which might have been under option to Francesco Galesi, Spectron's financial backer, because that

option did not come into being until later, after the application was filed. Tr. 491-492.

16. Upon the recall of Ms. Shaw for redirect (and recross) examination on November 9, 1984, Spectron established that she owned 31 shares (rather than 40) of voting stock which were authorized to be issued to her at the initial board of directors meeting and an additional 18 shares of non-voting stock which were subsequently acquired. Her non-voting stodk originated as voting stock issued to Thomas Morrison, was later made "nonvoting," and was subsequently transferred to her pursuant to a December 2, 1983 board of directors resolution. Spectron Exs. 13-17; Tr. 3181-3200. Ms. Shaw revised her earlier testimony that voting stock did not represent equity (Tr. 435) and reverted back to her original claim (Tr. 424) that each share of voting or non-voting stock

represented one share of equity. Tr. 3213-3216. Her stock represents 52% of Spectron's equity. Tr. 3186. She testified that she had no role in maintaining Spectron's records, and that corporate secretary Briding Newell and Spectron's local counsel are in total control of those documents. Tr. 3216-3217. She regularly reviews corproate documents only at board and stockholder meetings, when all the other directors and stockholders also have an equal opportunity to review them. Tr. 3217. Also, it was revealed that at the initial stockholders meeting held on March 18, 1983, Francesco Galesi signed an "offer to purchase 10 shares" of Spectron common stock for $10. Spectron Ex. 13 at 14. The same hearing exhibit indicates that the other "voting" and "non-voting" shareholders present at the meeting signed similar agreements. However, Galesi's name does not appear on the Spectron stock ledger, Jarad

Ex. 15, which also lists Ms. Shaw as owning 40 shares (as she originally testified) and which does not distinguish between "voting" and "non-voting" shares. A stock certificate for 10 shares was issued to Mr. Galesi but apparently was subsequently cancelled. Jarad Ex. 16 at 8-9 (stock certificate number 5).[6]

17. Furthermore, the record evidence shows that there are great similarities between the voting and non-voting classes of stock of Spectron. Each share was purchased for $1, Tr. 417, and thus the sale of the 95 shares of authorized and issued stock represents $95 in capital proceeds, a rather insignificant sum compared to the funds needed to prosecute the application through hearing, let along construct a station. As indicated previously, all of Spectron's stock was initially "voting" stock until the board of directors and shareholders meetings were held on March 18, 1983, when the stock

was subdivided into two classes, with the only distinction between them being the putative presence or absence of voting rights. Ms. Shaw testified that at the March 18 meetings, Spectron's lawyers decided upon the number of shares and class of stock to be distributed among the various stockholders, Tr. 418-419, after first determining which shareholders could devote full time to the station and after considering how to take advantage of the Commission's minority and female qualitative enhancement policy. Tr. 624-626. No independent business purpose, other than maximizing an ownership integration preference, is evidence from the record for Spectron's decision to create voting and non-voting classes of stock. Presumably, such a purpose also fully accounts for the subsequent reclassification of Mr. Morrison's 18 shares of stock as "non-voting" and, quite possibly, for its

ultimate transfer to Ms. Shaw.

18. In addition, three of Spectron's purported non-voting shareholders are proposed to serve on station policy committees, and two of them will devote significant amounts of time to the station on a regular basis. See paragraph II, supra. Ms. Briding Newell, who owns 15 shares of Spectron stock (I.D., para. 25), has proposed:

> "[T]o devote approximately 10 hours per week to the day-to-day operations of the station...on the Community Affairs, Editorial Policy and Programming Committees...with special emphasis on the Programming Committee. [She] intends to particularly focus on the development of news programming for the station..."

Spectron Ex. 4 at 6-7. She is also a director and officer of Spectron. Tr. 193, and is the only person other than Spectron's local counsel who has maintained Spectron's corporate records. Tr. 3216. She will reduce her time spend on other activities to assure that she can in fact keep her promise

to devote 10 hours per week to the station. Tr. 239-240. She expects not only to participate in making the decisions of the committees, but also to have some supervisory responsibilities in implementing the decisions. Tr. 241-242. Similarly, Mr. Roland H. Davis, who owns 22 shares of "non-voting" stock (I.D.), para. 25 testified:

> "I intend to be involved in an ongoing fashion with the operations and activities of the stations. I will serve, along with Spectron shareholders Angela Shaw, Briding Newell and James Shuart, on the Editorial Policy, Community Affairs and Programming Committees...to which I will devote from 10 to 20 hours each week...I believe my experience in the community and the insights which I have into the workings of the local governments and various civic and community organizations will permit me to make a special contribution to the station in terms of the development of local and public affairs programming, as well as in the creation of special opportunities for civic involvement by the station..."

Spectron Ex. 3 at 6-7. However, on cross-examination Davis stated that he would

not be involved with station operations but would be serving largely in an advisory capacity on the three committees and on the board of directors. Tr. 300-305. Nevertheless, he affirmed that he would be involved in policy-making, Tr. 306-307, and that he, Briding Newell, and Angela Shaw each had one vote on the board of directors, which has the power to hire and fire officers of the company. Tr. 328-330. This active managerial and policy-making involvement of at least two of Spectron's "non-voting" shareholders, by itself, is sufficient to decisionally diminish the ownership integration credit due Spectron, because their involvement significantly dilutes the degree of exclusive authority to manage and control the corporation and operation of the station ostensibly held by the sole "voting" shareholder, Ms. Shaw. See Signal Ministries, Inc., FCC 86R-50, released August 18, 1986, paras. 13-16.[7]

19. Finally, we find that the Galesi-Wolkonsky loan agreement further weakens Spectron's integration posture. Francesco Galesi is a friend of Ms. Shaw and had expressed an interest ins upporting her business ventures. Tr. 562. 648-649, 3106-3107. Before Spectron's application was filed, Shaw and Galesi discussed the possibility of Galesi providing funds to prosecute the application. Tr. 560-562, 3106-3107. Shaw and George W. Bott, a vice president of the Galesi Group, has had a draft agreement prepared between Spectron and Galesi. Jarad Ex. 13. Under the draft agreement, Galesi would deliver $10,000 cash to Spectron and could be required to guarantee unconditionally up to $250,000 in repayments to Spectron's lenders, Id. at 3. In return, Galesi would receive a non-negotiable note with the option to convert the note into 33 shares of Spectron non-voting stock. Id. at 8. The draft

agreement and promissory note used the term "non-voting stock" seventeen times.

20. However, the draft agreement was not executed. After further negotiation, the parties signed a loan agreement on May 23, 1983, one week after the Spectron application was filed and over two months subsequent to the board/stockholders meeting at which Galesi signified his intent to purchase 10 shares of Spectron stock. Jared Ex. 8. The agreement calls for Galesi to lend Spectron $10,000 in return for a note and "an option to purchase up to ten (10) shares of Common stock" at the price fo $1 per share. Id. at 1, 7. Galesi also obtained a right of first refusal to purchase an additional 51 shares of common stock at a price of $4,902 per share. Id. at 8. Nowhere in the agreement was "non-voting" stock mentioned. Indeed, Spectron warranted that: "There are no outstanding agreements relating to the

voting...of any shares of capital stock of the Company." Id. at 3. Thus, the terms of the loan agreement clearly imply that Galesi would receive voting stock. However, on December 2, 1983 (one week before the "B" cut-off date), Galesi assigned his interest to his wife, Marina Wolkonsky. I.D., para. 26. In return for financial advances pursuant to the May 23, 1983 loan agreement - which covers almost all of Spectron's expenses to date (Tr. 536-544) - Ms. Wolkonsky obtained promissory notes from Spectron on or about March 8, 1984 (for $29,412) and July 1, 1984 ($24,510). Spectron Exs. 11, 12. The documentation provides that Ms. Wolkonsky may at her option redeem the notes for 6 and 5 shares, respectively, of "non-voting" stock. Nevertheless, in view of the clear intent of the May 23, 1983 loan agreement not to limit the option to "non-voting" stock, we cannot be assured Ms. Wolkonsky will not obtain

voting stock when she ultimately redeems her notes, which would obviously occur at a time subsequent to grant of the Spectron application. Accordingly, the provisions of the May 23, 1983 loan agreement further serve to weaken Spectron's integration proposal.

21. In summary, numerous deficiencies in Spectron's proposal preclude us from awarding it the full 100% integration credit it seeks. Of its five non-voting stockholders other than Ms. Shaw, two sit in its three-person Board of Directors and will also be active in managing the station on a daily basis through their participation on three policy-making committees, and a third will also sit on these committees. Their participation dilutes the credit Ms. Shaw might otherwise be entitled to. See Signal Ministries, Inc., supra, and cases cited therein at para. 15. We also cannot be certain that the Glaesi option agreement

would not ultimately result, for the reasons discussed above, in the transfer of voting stock to Ms. Wolkonsky, thereby further reducing the exclusivity of Ms. Shaw's corporate control. Nor are we content, on the basis of the state of her own confused testimony, that Ms. Shaw will exercise the control Spectron claims for her. As we have said many times, it is not sufficient for an applicant seeking integration credit to maintain, as Spectron does here, that it has created its business entity in conformity with local governing law. See, e.g., Bradley, Hand and Triplett, 89 FCC 2d 657, 662-63 (Rev. Bd. 1982). To carry out the purposes of our comparative policies, we may look beyond formal corporate structure in order to ascertain where true ownership and control rests, KIST Corp., 58 RR 2d 1483 (1985), and diminish integration credit accordingly when "non-voting" owners partake in management. Some exceptors content that

Spectron's credit must be reduced to at best 52% because that figure represents Ms. Shaw's percentage of Spectron equity, noting that she is the only stockholder proposing to work full-time, whereas others would reject its proposal as completely unreliable and award no credit. We need not decide between these theories, however, since it is plain that in either case Spectron is not entitled to credit approaching the 100% awarded to other applicants, and is, in ssence, eliminated from further comparative contention.

22. GCB. The ALJ credit GCB with 99% quantitative integration credit for the full-time participation of John Betaudier and Yvonne Betaudier, 53% joint owners, as general manager and vice president for station affairs, respectively; Phyllis Bernstein (30% owner) as news director; Betty Sutter (14% owner) as comptroller and business manager: and Edwin A. Bernstein

(2% owner) as sales manager. This integration proposal was qualitatively enhanced by the current service area residence of the Bernsteins and Mrs. Sutter, representing in toto 46% ownership, plus the proposed future local residence of the Betaudiers (53%); 16% credit for the civic participation of Mrs. Sutter and Mr. Bernstein; 28.5% credit for the broadcast experience of Mssrs. Betaudier and Bernstein; 53% credit for the participation of minority ownership (the Betaudiers) in management; and 70.5% credit for participating female ownership (Mmes. Betaudier, Bernstein, and Sutter). I.D., paras. 35-54. 170-175.

23. In its exceptions, GCB seeks additional 30% enhancement credit under the civic participation and broadcast experience rubrics for Ms. Bernstein. GCB Br. at 31-33. We will deny these exceptions. GCB presents us with a bare claim, unsupported

by any record citation, cf. 47 CFR 1.277(a) (exceptions "shall point out with particularity alleged material errors...and shall contain specific references to the page or pages of the transcript of hearing, exhibit or order if any on which the exception is based"), that Mrs. Bernstein has obtained "extensive knowledge of and interest in Long Island affairs gained after years of practicing her trade [which] qualifies her for civic participation credit." GCB Br. at 32. However, her testimony simply shows that: (1) she has been a freelance journalist for the past years who has had published many by-lined articles in The New York Times and in other media; (2) she worked during portions of 1968, 1969, and 1972 for UPI in New York City as a reporter on the city desk; (3) she performed public relations and media contact work for the Spanish National Tourist Office in New York City; (4) she has on four

occasions since 1979 taught a "Selling the Freelance Story" course at Adelphi University and in 1983 taught a 3-credit journalism course at the Polytechnic Institute of New York in Farmingdale; and (5) in 1974, she was the Leisure Editor of the Long Island Business Review, which experience she claims gave her "strong familiarity on all levels with the Long Island scene." GCB Ex. 3 at 2-3. This testimony fails to substantiate GCB's essential claim that Ms. Bernstein has sufficient "local activities indicating a knowledge of and interest in the welfare" of the service, GCB Br. at 33 (citing Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393, 396 (1965)). See also Broadcast Associates of Colorado, 59 RR 2d 741, 743 (Rev. Bd. 1985) (local activities resulting from an individual's occupation are generally less significant under the civic participation sub-factor than active

membership in community organizations and participation in leadership roles), reversed on other grounds. 60 RR 2d 721 (1986). As for her claim to broadcast experience, her testimony fails to show that she has either had "hands-on" broadcast station experience, or worked in a position that was significantly broadcast-related in the industry. Therefore, we will not award GCB any further broadcast experience credit. See Phoenix Media Corp., 56 RR 2d 1241, 1248-1249 (Rev. Bd. 1984), review denied, FCC 85-435, released August 6, 1985.

24. Other exceptions urge that quantitative credit for the GCB integration proposal should be significantly diminished because putative 2% shareholderEdwin Bernstein, and not the Betaudiers (53%), in reality dominates GCB. NSB Br. at 35-40; WINK Br. at 23-25. NSB also challenges the award of integration credit to Betty Sutter, a 14% owner and GCB's proposed full-time

comptroller and business manager. NSB Br. at 40-41. We reject these contentions. The ALJ did indeed find that Mr. Bernstein was the driving force behind formation of the GCB application. The exceptors, however, have been unable to point to evidence that would undercut the ALJ's holding that despite Mr. Bernstein's active role, he acted in concert with the other stockholders and that all actions taken were unanimously agreed to or ratified by the others. I.D., para. 173. The ALJ's conclusion is further supported by evidence showing all GCB stockholders have paid for their shares, that five out of the six GCB stockholders will be integrated in management positions at the station, that the Bernsteins have known the Betaudiers and the Sutters for many years, that Mr. Betaudier, who is proposed as general manager, has extensive broadcast experience, and will receive a higher salary than the others because of his

greater responsibilities, that Mrs. Betaudier and Mrs. Sutter are proposed for significant managerial positions, and that Mrs. Sutter currently co-owns and manages an office building. Thus, we cannot conclude that the GCB applicant is a sham and the Betaudiers mere figureheads without actual authority.

25. However, GCB finishes behind Jarad in any event. Specifically, Jarad's integration proposal, with 100% qualitative credits for service area residence, civic participation, and broadcast experience, is superior to GCB's proposal as credited in the I.D., with 46% service area residence credit (plus slight credit for the proposed future local residence of 53% more of its ownership), 16% civic participation credit, 28.5% broadcast experience credit, 53% minority ownership participation credit and 70.5% female ownership participation credit (but see para. 7, supra). In particular,

although Jarad's substantial local residence advantage (100% vs. 46%) is equalled by GCB's substantial minority preference (53% vs. 0%), see Radio Jonesboro, Inc. 100 FCC 2d 941, 945 (1985), its two other substantial preferences, for civic participation and broadcast experience, outweight GCB's single substantial preference for female ownership, which is now constitutionally suspect. See para. 7, supra. See also Talleyrand Broadcasting, 103 FCC 2d 476, 480, 481 (Rev. Bd. 1985) (proposed future local residence is insignificant in comparison to long-term service area residence; and 100% to 49% edge for female participation "probably offset" by moderate civic participation advantage along albeit female credit withheld pending clarification of Commission policy).

26. Westplex. The ALJ found that Westplex is a limited partnership whose two general partners, Kenneth L. Herring (51%

control) and Ramona Rivera (49% control), will serve full-time as programming manager and general manager, respectively, of the proposed station. Westplex was awarded 100% integration credit enhanced qualitatively by 100% credits for the general partners' long-term past service area residence, their promises to move to the proposed community of license, their "extensive" past broadcast experience, and their status as participating minority owners: 51% credit for Mr. Herring's civic participation; and 49% credit for participating female ownership (Ms. Rivera). I.D., paras. 56-71, 176-179. Westplex also received a very slight comparative demerit under the factor of diversification of mass media control because only after the "B" cut-off date did Mr. Herring make an unequivocal promise to terminate his current employment as program director of Station WTHE(AM), Mineola, New York, which serves substantially the same

area as Westplex's proposed station. Id., para. 177.

27. Challenging the award of 100% quantitative integration credit to Westplex, various exceptors assert: (1) Westplex is not a valid limited partnership under New York State law or the Uniform Limited Partnership Act and did not have an executed limited partnership agreement until after the hearing exhibit exchange date, and its limited partners are not sufficiently passive and insulated from station affairs to be ignored in the comparative evaluation; (2) Westplex proposes an impermissible transfer of control because, after the "A" cut-off date, it added a new 49% general partner, Ramona Rivera, to whom it has also given an option to become a 51% and controlling general partner one year after final grant of its application and who even now effectively controls the applicant; and (3) its general partners cannot effectuate

their integration proposals. Jarad Br. at 32-42; Spectron Br. at 12-19; GCB Br. at 27-31; NSB Br. at 41-43; WINK Br. at 25-27; and McComas Br. at 11-12. Westplex responded to these arguments. Reply at 2-21. For reasons that follow, we find that Westplex's untimately execution of its limited partnership agreement requires that the quantitative integration credit awarded to it in the I.D. be eliminated.

28. Westplex evolved as follows. A certificate of limited partnership, which did not describe whatsoever the control relationships amongst the various limited and general partners, was filed on July 26, 1983 at the Nassau County courthouse. DVI Ex. 5. Prior to December 9, 1983 (the "B" cut-off date in this proceeding), the partners were negotiating the admission of Ms. Rivera as a 49% general partner and considered a draft Memorandum of Understanding to be used as a basis for

entering a limited partnership agreement, but they never signed the memorandum. Jarad Ex. 12. The hearing sessions in this proceeding began October 22, 1984, I.D., para. 3, and Westplex finally completed the process of having its partners execute a limited partnership agreement on November 8, but did not produce this document until July 14, 1986. Westplex Errata to Opp. to Jarad Contingent Mot. to Reopen the Record and Enlarge Issues, filed July 14, 1986, Appendix A at 36, 40.

29. In Houston Family TV, Ltd., 101 FCC 2d 661, 668 (Rev. Bd. 1985), we recently held:

> "Oral understandings, stock options, and other inchoate ownership arrangements, until finalized, simply do not provide the type of 'reasonable assurance' that Bradley, Hand and Triplett, [89 FCC 2d 657, 662 (Rev. Bd. 1982).] requires as an underpinning for ownership integration credit. To rule otherwise would permit a corporate applicant to hypothesize a formidable integration proposal in its application, sans any binding

> ownership commitment, and then try to scare off comparative competition. If, as in the instant proceeding, its application appeared likely to prevail, it could demand stock subscriptions and purchases; on the other hand, if it came a cropper, the putative integrated principals could bail out without making any investment. The Commission cannot countenance such integration gamesmanship. A timely binding subscription agreement is the minimum price of admission for quantitative ownership integration credit."

Precisely the same considerations apply here. The limited partnership form is a malleable vehicle that can transmute a given ownership equity structure into a radically different and much more favorable ownership integration structure. Until a binding limited partnership agreement is signed, the applicant's structure is as inchoate as any other "oral understanding." Therefore, we hold that, for Westplex, the "minimum price of admission for quantitative ownership integration credit" was a binding, detailed limited partnership agreement submitted by

the time set by the presiding officer for the exchange of integration proposals.[8] See id. at 667. Westplex clearly failed this test; accordingly, it will be awarded no integration credit.[9]

30. NSB. The ALJ credited NSB for the 100% full-time integration of Gerald T. Reilly, 51% general partner, as general manager of the proposed station; Joel Mahan, 24.5% general partner, as programming manager; and Leonard Yam, 24.5% general partner, as assistant general manager who will direct community relations matters. The proposal was qualitatively enhanced by 100% credit for the broadcast experience of the three principals and 49% minority ownership credit for Mahan and Yam. In addition, NSB was charged wit a very slight demerit because Mr. Reilly is general sales manager for a low power television (LPTV) station licensed to Plainview, Long Island, and did not state that he would leave that

position if the NSB application were granted. I.D., paras. 73-83, 180-182, 204-205.

31. In its exceptions, NSB avers that the ALJ erred in assigning it a diversification demerit because its failure to state that Mr. Reilly would terminate his current LPTV position was "unwitting" and "an inadvertent oversight." NSB Br. at 90. It also claims that the ALJ awarded it insufficient qualitative enhancement credit under the integration factor. Specifically, it states that, despite the "51/24.5/24.5 split" among the three partners in case of a liquidation of NSB, they are "equal general partners" with respect to "their financial interest and liability in the station as a going concern" and in terms of their "legal responsibility while they operate the station." Id. at 10. Asking that we view each general partner as having one-third control of NSB, the applicant seeks 66.7%

minority ownership credit for Mahan and Yam, local residence credit of 100%, and civic participation credit of 66.7%. Id. at 10-13.

32. We shall first address NSB's integration exceptions. We disagree that NSB has adequately shown that each of its partners has one third control and that therefore it should be awarded 66.7% minority ownership enhancement credit. In its application, NSB stated its ownership to be, Reilly 51%, Yam 24.5%, Mahan 24.5%, and this representation was carried forward in its hearing exhibit no. 2, where it stated that "the ownership terms of the general partnership are as follows: Reilly 51%, Mahan 24.5%, Yam 24.5%." In view of these express representations, we cannot now allow the applicant to attempt to rely exclusively on its oral hearing testimony, which is at variance not only with its application but also with its written hearing exhibit, to bolster its enhancement position. In WHW

Enterprises Inc., 89 FCC 2d 799, 816 (Rev. Bd. 1982) (subsequent history omitted), we looked to voting control as spelled out in the partnership agreement to determine integration credit. Consistent with that approach, the ALJ here relied on the written evidence put forth by the applicant to support his analysis. We concur.

33. As the ALJ recognized, Mr. Yam resided in Westbury, New York, from 1970 through 1981, and since 1981 has resided in Elmhurst. I.D., para. 80; NSB Ex. 4 at 2. Both Westbury and Elmhurst lie within the proposed service area, see Westplex Ex. 6 at 2, and therefore NSB is certainly entitled to 24.5% credit for long-term service area residence. Mr. Reilly resided in the service area from birth until the age of three or four, attended college there, and has for the past two years worked but not resided within the service area. I.D., para. 80; Tr. 1503. We recognize a slight credit

for Mr. Reilly's tenuous connection with the service area, but find it to be a substantially less important nexus than the long-term and current service area residence of Jarad's Mr. Morey. Service area residence which occurs during the earliest years of life, when one's cognitive abilities are just beginning to grow, does little to significantly further one's knowledge of, or appreciation for, the needs and problems of the service area - the very purpose for which the Commission recognizes local residence as an enhancing attribute. See Policy Statement, supra, 1 FCC 2d at 395-396. Finally, Mr. Mahan's connection with the service area stems from and apparently ends with, his attending college there. I.D., para. 83; NSB Exs. 5, 5A; see NSB Br. at 12, and deserves a slight credit. After weighing the 24.5% long-term service area residence credit for Mr. Yam plus the slight credits for Reilly and Mahan against

the 100% long-term service area residence credit for Mr. Yam plus the slight credits for Reilly and Mahan against the 100% long-term service area residence of Jarad's Mr. Morey, we award Jarad a substantial preference over NSB under the local residence enhancement factor.[10]

34. Next, we find NSB's claim for civic participation credit for Yam and Mahan to be weak. Basically, NSB claims that while attending college, Mr. Yam "was involved in broadcasting activities, including shows dealing with political and civic affairs." NSB Br. at 11. Likewise, Mr. Mahon became acquainted with - but did not join or participate in - community organizations, as part of his collegiate experience at the campus radio station and an area cable television company. Id.at 12. These activities appear to have been incidental to their work experiences and, in any event, were too tenuous to receive

significant credit. In our view, Jarad merits at least a moderate preference over NSB for civic participation.

35. We also point out that, although the ALJ awarded both Jarad and NSB 100% credit for broadcast experience, Jarad has a qualitative edge here too. NSB's Mr. Reilly has been general sales manager of an LPTV station since April 1984 and was an account executive in sales for a radio station from August 1983 until February 1984. I.D., para. 81. From 1982 to 1984, he was employed part-time to locate LPTV stations for Bogner Broadcasting and to negotiate their purchase and construction. Id. Mr. Yam's total broadcast experience occurred while at college at the campus radio station and during two 3-month internships with New York City radio stations, involving two or three days a week. Id., para. 82. Mr. Mahan's broadcast experience also began at his campus radio station and has involved

part-time positions at Cablevision from January to May 1981, and at NBC in New York, since September 1984. Id., para. 83. Thus, the broadcast experience of NSB's principals is relatively short in duration and predominantly part-time or college-related. By contrast, Jarad's Mr. Morey has been involved with broadcasting since 1964, although predominantly as an announcer. Id., paras. 16-17. Therefore, Jarad merits at least a slight preference for broadcast experience. Although NSB would have a substantial minority ownership preference for a 49% to 0% advantage (but see para. 7, supra), that preference would be fully counterbalanced by Jarad's substantial local residence preference. See Radio Jonesboro, supra. 100 FCC 2d at 945. Jarad, having additionally at least moderate civic participation and slight broadcast experience preferences, is entitled to a slight, but decisive, overall integration

preference over NSB. See id., 96 FCC 2d 1106, 1112 (Rev. Bd. 1984), aff'd, 100 FCC 2d 941, 948 (1985).

36. We also deny NSB's diversification exception. NSB does not dispute that it revealed that Mr. Reilly would resign his general sales manager position at a nearby LPTV station after the "B" cut-off date in this proceeding. Accordingly, because its divestiture announcement came too late, a very slight diversification demerit was properly assessed against it. See Reginald A. Fessenden Educational Fund, Inc., 100 FCC 2d 440, 446 (Rev. Bd. 1985), review denied, 59 RR 2d 1267 (1986).

37. DVI. The ALJ found that although neither DVI nor its sole stockholder, Byron E. Lewis, has any ownership interest in other broadcast stations, it must nevertheless be assessed a slight diversification demerit because Mr. Lewis is a 51% stockholder in Uniworld Group, Inc.

(Uniworld), a New York City-based marketing company. Uniworld, which serves at times as a conventional advertising agency, placed $20 million in advertising in the last year and has bought time from broadcast stations whose signals cover DVI's proposed service area. Mr. Lewis does not propose to divest his ownership interest in Uniworld. I.D., paras. 85-90, 97, 183. With respect to the integration factor, the ALJ found that although Mr. Lewis proposed to devote 40 or more hours per week as full-time general manager of DVI's proposed station, he would not be able to effectuate this full-time promise in light of other commitments to work 20 hours per week at Uniworld and to continue to devote 10 hours per week to another DVI business venture aimed at developing the Harlem district of New York City as a tourist and cultural center. The ALJ therefore awarded DVI 100% part-time credit. Id., paras. 91-93, 184-185. DVI

also received qualitative enhancement credit for Mr. Lewis' past long-term service area residence, proposed future local residence, civic participation, and minority status, as well as a slight credit for Mr. Lewis' familiarity with radio station production operations. Id., paras. 94-96, 186.

38. In its exceptions, DVI argues that it should have been awarded 100% full-time integration credit because Mr. Lewis' testimony allegedly shows that he will be able to effectuate his full-time proposal by reducing the time he typically spends on outside interests to 4-5 hours per week and, even under extreme circumstances, he would devote no more than 20 hours a week to outside activities, DVI Br. at 4-14. We deny this exception.

39. Mr. Lewis is, and intends to maintain his position as Chairman, Chief Executive Officer (CEO), and majority stockholder of Uniworld. DVI Exh. 1 at 1;

Tr. 2056-2057, 2077. Although he indicated in pre-hearing answers to interrogatories that he would discontinue his positions as Chairman and CEO, he testified at hearing (Tr. 2077) as follows:

> "I reassessed my position. I thought about having built the company for 15 years with my sweat and I believed that there was an easy opportunity to maintain my position as chairman. [CEO] with my control of the company and also have more than enough time to work at the radio station."

This change of heart is quite understandable, given that Uniworld is a substantial business which employs some 45 individuals, places approximately $20 million a year in advertising, and earns about $3 million in fees per annum. Tr. 2030, 2167-2169. In order to reduce his Uniworld activities, which then require significantly more than 40 hours per week of his time, Lewis had, approximately a year ago, hired a president to run Uniworld's day-to-day operations; nevertheless, he has

continued to work a full 40-hour week at Uniworld. DVI Exh. 1 at 1; Tr. 2040-2051. Lewis is the person in charge at Uniworld, having hired the company's president and key employees with whom he maintains daily contact. Tr. 2040-2051. He fired the former president because "he couldn't do the job." Tr. 2066.

40. To further reduce his future time commitment to Uniworld to "no more than 20 hours per week," DVI Exh. 1 at 1, Mr. Lewis hopes and anticipates that the management team he has assembled will be able to handle Uniworld's admittedly "volatile" business, enabling him to spend as little as 7-8 hours per week (including a weekly 4-5 hour executive committee meeting) at Uniworld. Tr. 2057-2066. He testified that in case of very serious financial difficulty at Uniworld, he might have to spend 10 or 15 hours a week there. Tr. 2063. However, when asked whether he could foresee any

situations in which he might have to spend more than 20 hours a week at Uniworld, he responded: "The only likelihood would be the extreme catastrophe [i.e., very serious financial difficulty] that was mentioned before." Tr. 2078. Nevertheless, he expects to work at the proposed station at least 40 hours a week because he has a "commitment" to do so. Tr. 2161-2164.

41. Also. Uniworld advertises in Credits, which is a magazine distributed to CEO's of major corporations, that Mr. Lewis personally is "closely involved with all of the agency's accounts." Tr. 2115-2126. This advertisement was based on information supplied by Mr. Lewis, who also claimed that the statement is accurate and will remain so. Id. However, he further explained that the statement was not intended to mean that he is involved daily with the accounts, but only that he personally knows many of the clients' key people and knows "what is going

on" at these companies. Id.

42. What clearly emerges from the record evidence cited above is that Uniworld is a substantial business whose creation and success has been significantly due to Mr. Lewis' efforts. He has an important financial and personal interest in Uniworld, will continue to oversee the company regardless of whether DVI obtains the proposed station, and will take whatever steps are needed to assure Uniworld's success. The ALJ was manifestly correct in finding that Mr. Lewis' future time commitment to Uniworld would not involve less than 20 hours per week, especially in view of his written testimony that stated only that "he will devote no more than 20 hours per week" to Uniworld. DVI Exh. 1 at 1. See Caldwell Broadcasting Corp., 100 FCC 2d 115, 125 n. 11 (Rev. Bd. 1985) (commitment expressed in terms of a range of time should be narrowly construed against

the applicant), rev. denied, FCC 86-245, released May 15, 1986; Midwest Broadcasting Co., 70 FCC 2d 1489, 1495 n. 11 (Rev. Bd. 1979), rev. denied, FCC 79-397, June 21, 1979. In addition, Mr. Lewis' oral testimony that he actually would work fewer than 20 hours per week at Uniworld was not unequivocal. Compare Tr. 2078 with Tr. 2057-2066.

43. Also, it is undisputed that Mr. Lewis, as part of another DVI business project, has been devoting and will continue to devote, 10 hours per week to promoting the development of a tourism program in the Harlem district of Manhattan. Tr. 2094-2102. Therefore, Mr. Lewis' overall proposal is exactly what the ALJ considered it to be: 20 hours per week at Uniworld in Manhattan, 10 hours per week to the Harlem tourism project, and 40 hours per week to the proposed broadcast station in Garden City, i.e., a total work week of at least 70

hours. See I.D., para. 184. Also, the ALJ properly noted that the trip between Garden City and Manhattan is significant in terms of distance and traffic congestion. Id.

44. In sum, Mr. Lewis' total time commitment to his various business interests, including commuting time, exceeds the 70-hour per week demarcation of the "outer limits of credibility," Northern Sun Corp., 100 FCC 2d 889, 892 (Rev. Bd. 1985), recon, Denied, 100 FCC 2d 1440, rev. denied, FCC 86-135, released March 28, 1986; see also Caldwell Broadcasting Corp., supra, 100 FCC 2d at 125: Radio Jonesboro, Inc., 96 FCC 2d 1106, 1108 (Rev. Bd. 1984), Rev. denied, 100 FCC 2d 941 (1985). We find that, despite his stated intention to work full time at the station, Mr. Lewis' commitments to other business ventures are too major an undertaking to warrant our complete confidence that he would regularly maintain a full-time, 40-hour per week,

work schedule at the station. See Berryville Broadcasting Co., 70 FCC 2d 1, 8-12, 12-13 (Rev. Bd. 1978) (two integration proposals, one involving a 70-hour work week including commuting time, and the other involving 61-71 hours a week in addition to drive time, discounted completely): see also Washington's Christian TV Outreach, 99 FCC 2d 395, 417-418 (Rev. Bd. 1984); Blancett Broadcasting Co., 17 FCC 2d 227, 230 (Rev. Bd. 1969). Nevertheless, the ALJ's conclusion that DVI should be accorded part-time credit, which is tantamount to a 20-hour per week commitment to station management, appears reasonable based on the record evidence in this case. But even were DVI accorded 100% "substantial time" credit, which is the type of credit applicable to 30-hour per week integration proposals, Webster-Baker Broadcasting Co., 88 FCC 2d 944, 953 (Rev. Bd. 1982), rev. dismissed, FCC 821-23, released November 18, 1982, and

which is the very most credit we could possibly award here, DVI's integration proposal would still be decisionally behind Jarad's 100% full-time proposal. This is because "[t]o the extent that the time spent moves away from full time, the credit given will drop sharply," Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393, 395 (1965), and, consequently, full-time integration is "disproportionately superior" to substantial (30-hour per week) integration. Webster-²Baker Broadcasting, supra, 88 FCC 2d at 956: see also Big Bend Broadcasters, 96 FCC 2d 166, 170 (Rev. Bd. 1983); Tele-Broadcasters of California, Inc., 58 RR 2d 223, 232-233 (Rev. Bd. 1985). The resultant clear quantitative difference between the Jarad and DVI integration proposals cannot be overcome by differences in their qualitative attributes. See Van Buren Community Service, 87 FCC 2d 1018, 1022 (Rev. Bd. 1981).[11]

45. WINK. The ALJ found that WINK has no attributable media ownership interests. I.D., para. 187. He awarded WINK 100% full-time credit for the proposed integration of Ronald E. and Winifred C. Graiff, who are husband and wife and who are each 50% owners of WINK, as general manager and station manager, respectively, of the proposed station. Id., paras. 102-104, 188, 205. WINK's integration proposal is qualitatively enhanced by Mrs. Graiff's past long-term service area residence (from 1948 until March 1973). Mr. Graiff's past short-term service area residence (from late 1969 until March 1973), their promise to relocate to Garden City if WINK's application is granted. id., para. 105, 188; Mrs. Graiff's civic participation within the service area, id., paras. 106, 188; and Mr. Graiff's broadcast experience since 1964, id., paras. 107, 188. (The ALJ also awarded WINK 50% female ownership enhancement credit

for Mrs. Graiff's participation, id., para. 188, which will disregard. See para. 7, supra and Talleyrand Broadcasting, supra.) Finally, although the ALJ recognized that WINK's service area included 6,523,797 people compared to 5,350,585 for the other applicants, he did not award WINK a comparative coverage preference because all covered areas already received service from 18 FM stations and 5 AM stations, and thus were well-served. Id., paras. 10-11, 167.

46. In its exceptions, WINK correctly points out (Br. at 8-10) that, based upon its proposed service to about 1.2 million additional well-served people, it should have been awarded a slight comparative coverage preference. See Barton Broadcasting Co., 60 RR 2d 322, 326-327 (Rev. Bd. 1986) (slight preferences are awarded to applicants having substantial overall coverage advantages where the entire service areas are well-served), and cases

cited therein.[12]

47. WINK also excepts (Br. at 34-38) to the ALJ's denial of its motion to enlarge issues, filed on May 17, 1984, insofar as it sought the addition of a comparative programming issue, Memorandum Opinion and Order, FCC 84M-2853, released June 25, 1984. The ALJ fully considered this motion and held that WINK filed to specifically allege facts showing a substantial or material difference in quality between the respective programming proposals of WINK and the other applicants. Id., para. 4. WINK's exception indicates only that it will respond in a typical way to community needs but fails to make a prima facie showing of "superior devotion to public service." See Chapman Radio and Television Co., 7 FCC 2d 213, 214 (1967). Because WINK's exception fails to present a "clear showing of error." RKO General, Inc. (KHJ-TV), 8 FCC 2d 880, 882 (1967), we affirm the ALJ's ruling.

48. In sum, WINK's comparative showing consists of its absence of any diversification demerit, its slight comparative coverage preference, and its 100% full-time quantitative integration credit with appropriate enhancements. In comparison with front-runner Jarad, WINK is decidedly qualitatively inferior with respect to local residence, civic participation, and broadcast experience. First, as to local residence we must weigh Jarad's 100% credit is both larger than WINK's and is for current civic participation whereas WINK's 50% credit represents civic activities within the service area which apparently ceased with Mrs. Graiff's move from the service area in 1973. See Radio Jonesbodo, Inc., 96 FCC 2d 1106, 1109-1110 (Rev. Bd. 1984), aff'd, 100 FCC 2d 941, 947 n. 16 (1985); Northern Sun, supra, 100 FCC 2d at 892-893. Finally, Jarad's 100% credit for long-term broadcast

experience significantly exeeds WINK's 50% credit.

49. Thus, Jarad is significantly ahead of WINK in each of these three qualitative enhancement categories. Even if the 50% female ownership enhancement credit awarded WINK by the ALJ were considered, see paras. 25, 45 and para. 7, supra that credit would still be solidly outweighed by Jarad's significant advantages. See Reginald A. Fessenden Educational Fund, Inc., supra. 100 FCC 2d at 454-455. Therefore, we award Jarad a slight overall integration preference over WINK, see Radio Jonesboro, supra, 96 FCC 2d at 1112, which in turn outweighs WINK's slight comparative coverage preference, see Cannon's Point Broadcasting Co., 93 FCC 2d 643, 656 (Rev. Bd. 1983) (integration factor is normally more important than comparative coverage) (subsequent history omitted) and therefore places Jarad ahead of WINK in the overall

comparative analysis. See also Barton Broadcasting, supra, 60 RR 2d at 326-327 (winner preferred in three integration enhancement factors whereas loser preferred in only coverage to well-served areas); Northern Sun, supra, 100 FCC 2d at 894-895.

50. Fonic. The ALJ credited Fonic with 76% full-time integration for the proposed station management participation of owners Christina Mamos (52% partner) and Teddy Savalas (24% partner) as general manager and station manager, respectively. Because a third partner, Telly Savalas (24%), is not proposed to be integrated into station management, no corresponding credit was awarded. I.D., paras. 109, 111, 115, 119, 190. Fonic has filed a makeweight exception seeking an additional 24% integration credit based on the beneficial effect on station performance it speculates will result from Telly Savalas' ownership association with the station. Fonic Br. at

4-9. It does not, however, except to the ALJ's findings that Telly Savalas will not be integrated into station management. Accordingly, we deny its exception as contrary to long-established Commission policy. See Policy Statement, supra. 1 FCC 2d at 395-396; e.g., Georga Mountain Corp., 57 RR 2d 1020, 1024 (Rev. Bd. 1985), rev. Denied, FCC 85-559, released October 18, 1985. With only 76% full-time credit, Fonic is decisionally behind Jarad which has been credited with 100% integration. See Vacationland Broadcasting Corp., 97 FCC 2d 485, 495 (Rev. Bd. 1984) (subsequent history omitted).

51. McComas. The ALJ assessed a very slight diversification demerit against McComas because its sold stockholder, James P. Miro, has an 8% interest in an AM broadcast station at San Juan, Puerto Rico. I.D., paras. 159, 161, 200. McComas also received 100% full-time integration credit

for Mr. Miro's proposed role as general manager of the station. Id. paras. 162, 201, 205. In its exceptions, McComas urges that the San Juan station should be regarded as a de minimis interest and, therefore, it should not receive any diversification demerit. We disagree. The Commission considers media interests in distant radio stations as relevant to the diversification factor, CJL Broadcasting, Inc., 95 FCC 2d 544, 549 (1983); Joseph Bahr, 92 FCC 2d 114 (Rev. Bd. 1982), and, after considering McComas' argument that San Juan is well served by other media and that the proposed station is an FM station whereas the extant San Juan station is an AM station, we conclude that the ALJ's assessment of a very slight demerit against McComas was reasonable.

52. More significantly, Westplex has pointed out in its exceptions (Br. at 43) that McComas filed on January 9, 1986 a

post-hearing statement that Mr. Miro "is in Puerto Rico, preparing to enter into active service with the Marine Corps for a six-year term of duty." At oral argument, McComas' counsel conceded that Mr. Miro was commissioned as a Marine Corps officer on December 12, 1985 and will be on active duty for at least 3 years, and more probably 6 years. Tr. of Oral Argument at 3642. Because it therefore appears that Mr. Miro will not be available to fulfill his managerial commitment to the proposed station for quite some time, we must withhold awarding McComas any integration credit whatsoever. See Voca Intersectario Verdad America, Inc., 100 FCC 2d 1607, 1614-1615 (Rev. Bd. 1985), and cases cited therein; cf. Houston Family TV, supra, 101 FCC 2d at 668 ("reasonable assurance" is required before integration proposal can be credited). Accordingly, McComas finishes very low in the comparative analysis, and

its remaining exceptions are non-decisional.

53. Comparative Summary. After considering all decisionally significant exceptions, we have found that Jarad, with 100% quantitative integration credit enhanced by 100% qualitative credits for local residence, civic participation, and broadcast experience, is comparatively the best applicant in this proceeding. Close behind with essentially equal quantitative credit, but lesser qualitative enhancements, are WINK, which also has a less important edge for greater coverage of well-served areas, and GCB. NSB, which also trails Jarad on qualitative integration, received a very slight diversification demerit. The remaining applicants finished much further down in the pack. We therefore conclude that a grant of the Jarad application will best serve the public interest, convenience, and necessity.[13]

54. ACCORDINGLY, IT IS ORDERED, That

the Petitions for leave to amend filed on May 14 and June 27, 1986 by Garden City Broadcasting, Inc. and Westplex Broadcasting Company, respectively, ARE GRANTED and the amendments ARE ACCEPTED:[14]

55. IT IS FURTHER ORDERED, That the contingent motions to reopen the record and enlarge issues filed on June 26 and 27, 1986 by Jarad Broadcasting Company, Inc. ARE DISMISSED.[15]

56. IT IS FURTHER ORDERED. That the motions to strike filed May 20 and July 30, 1986 by Westplex Broadcasting Company and Jarad Broadcasting Company, Inc., respectively, ARE DENIED; and

57. IT IS FURTHER ORDERED. That the application of Jarad Broadcasting Company, Inc. (File No. BPH-830325AC) for authority to construct and operate a new FM broadcast station at Garden City. New York IS GRANTED, the application of Mid-Island Broadcasting, Inc. (File No. BPH-830714AK)

IS DISMISSED, and the applications of Spectron Broadcasting Corporation (File No. BPH-830516AK), Garden City Broadcasting, Inc. (File No. BPH-830713AO). Westplex Broadcasting Company (File No. BPH-830714AE), North Shore Broadcasting (File No. BPH-830714AF), December Ventures, Inc. (File No. BPH-830714AG), WINK Radio, Inc. (File No. BPH-830714AH0, Fonic Broadcasting Co. (File No. BPH-830714AI), and McComas Broadcasting Corporation (File No. BPH-830714BF) ARE DENIED.

Eric T. Esbensen
Member, Review Board
Federal Communications Commission

FOOTNOTES

[1]Previously, the Commission denied the application for renewal of the WLIR(FM) license, filed by Stereo Broadcasters, Inc., because the licensee had "unlawfully transferred control of [the] station...without Commission authorization, made misrepresentations, and lacked candor about the incident. Stereo ha[d] also committed serious misrepresentations in connection with violations of [the Commission's] technical rules, some of the violations being willful." Stereo Broadcasters, Inc., 87 FCC 2d 87, 117 (1981), recon. denied, 50 RR 2d 1346 (1982). Since January 10, 1983, and pursuant to a Commission grant of Special Temporary Authority, Phoenix Media Corp. has broadcast from the WLIR(FM) facilities. Phoenix Media Corp., FCC 86-268, released May 28, 1986, at para. 2. Although, following a comparative hearing, Long Island Radio Communications, Inc. had been granted interim authority to operate the WLIR(FM) facilities, Phoenix Media Corp., 56 RR 2d 1241 (Rev. Bd. 1984), review denied, FCC 85-435, released August 6, 1985, the Commission has since stayed that grant and has authorized Phoenix Media to continue operating pending further action by the Commission. FCC 86-268, supra.

[2]Three other applications, those of Women's Long Island Radio, Inc., Mid-Island Broadcasting, Inc., and Hempstead Broadcasting Corporation, were originally designated in the HDO. The Initial Decision denied the Mid-Island Broadcasting application, and the applicant has not filed any exceptions: accordingly, we will dismiss that application for failure to prosecure. See 47 CFR 1.276(f). The other

two applications were dismissed by the presiding officer for failure to prosecute. See Initial Decision at note 1.

[3]Exceptions have also been levied against the weight of Jarad's qualitative enhancement credits as they compare to those of the various other applicants. The ALJ properly credited Jarad with 100% credit for Mr. Morey's service area residence since 1977; for his limited civic participation as fundraising chairman for an area private school which his son attends and as a dues-paying member and yearly meeting attendant of the Brookville Taxpayers Association; and for his broadcast experience as a station announcer (1965-1974) and assistant director of programming (1971-1972) and broadcast-related experience as a free-lance "voice over" announcer (since 1975). I.D., paras. 15-17, 168, 205; Jarad Exh. 1. These qualitative enhancement factors need be weighed in our comparative summation, infra, against only those applicants, if any, for whom there is no "clear quantitative difference" between their quantitative integration credits and Jarad's 100% full-time credit. See, e.g. Vacationland Broadcasting Co., Inc. (WFTW-FM). 97 FCC 2d 489, 495 (Rev. Bd. 1984) (subsequent history omitted).

[4]This result makes it unnecessary to consider whether the ALJ erred procedurally in excluding proferred rebuttal evidence by the other applicants intended to discredit Mr. Morey's claim.

[5]Spectron did not formally amend its certificate of incorporation to permit the issuance of non-voting stock until Januar 10, 1985.

[6]Further details concerning the involvement of Mr. Galesi in the application will be discussed infra at paras. 19-20.

[7]We also note, although the parties have not argued this point, that Spectron's by-laws may be ambiguous as to the powers of voting versus non-voting shareholders. On the one hand, with regard to the power to elect a board of directors, the by-laws provide:

> Art. III, Sec. 1(b): Except as may otherwise be provided herein or in the Certificate of Incorporation, the members of the Board of Directors of the Corporation, who need not be shareholders, shall be elected by a majority of the votes cast at a meeting of the shareholders, by the holders of shares entitled to vote in the election.

Jared Ex. 7 at 4 (emphasis added). However, the by-laws section delinating voting rights at shareholders meetings provides to the contrary that:

> Art. I, Sec. 6(a): Except as provided by statute or by the Certificate of Incorporation, any corporate action, other than the election of directors to be taken by vote of the shareholders, shall be authorized by a majority of votes case...by the holders of shares entitled to vote therin.

Id. at 3 (emphasis added). If the "non-voting" shareholders do vote in board of directors elections, then we wonder what significant actions remain that would require the exclusive "vote" of the sole "voting" shareholder in a close corporation such as Spectron.

[8]This date was July 16, 1984, well before the date when all the Westplex partners signed the partnership agreement.

[9]This result obviates the need to reach exceptors' other contentions that Westplex has engaged in an unauthorized transfer of control or that its general partners cannot effectuate their proposals. We affirm, however, the ALJ's assessment of a very slight diversification demerit against it. We also note that denial of integration credit to Westplex could also be premised on that applicant's inadequate showing that its proposed limited partners were sufficiently insulated from management. Specifically, it appears from the record that the limited partners have been active throughout the application process in selecting communciations counsel, attending and participating in meetings, selecting the partnership form, and putting the group together. It also appears that the general partners did not meet together before the B cut-off date or ever in the absence of the limited partners. Thus, even had Westplex developed a timely written limited partnership understanding, the questionable bona fides of that agreement would have resulted in decisionally diminished integration credit.

[10]The magniture of this preference would be unaffected by any consideration of NSB's belated claim that its three partners would move to Garden City if the application were granted, see NSB Br. at 13, because proposed future local residence is insignificant in comparison to long-term service area residence. Talleyrand Broadcasting, supra, 103 FCC 2d at 480.

[11]We also deny DVI's exception to the slight diversification demerit assessed

against it by the ALJ. See DVI Br. at 14-22. It is undisputed that DVI's sole stockholder, Mr. Lewis, owns 51% of Uniworld, which places advertising on broadcast stations that cover portions of DVI's proposed service area. Though advertising firms per se are not media of mass communciations, placement of advertisement on stations serving the area is relevant to the commission's diversification objectives. Berryville Broadcasting, supra, 70 FCC 2d at 15. While the size of DVI's demerit could conceivably be reduced to "very slight," we need not dwell on this matter in light of our above analysis of the integration factor, which is the decisive comparative element in this case.

[12] In view of our ultimate conclusion herein, see para. 49, infra; we need not reach Westplex's exception (Br. at 4-16) that the ALJ erred in adopting WINK's engineering exhibit rather than the competing applicants' joint engineering exhibit which shows WINK's population advantage to be only about 38,000 people.

[13] We agree with and adopt the ALJ's resolution of the main studio issue in favor of Spectron, I.D., paras. 4-8, 165-166. We need not address further the exceptions to this issue because of our ultimate conclusion herein. Also, we shal dismiss as moot Jarad's contingent motions to reopen the record and enlarge issues against Spectron and Westplex. Finally, we did not discuss auxiliary power, which was proposed by each applicant, id., para. 203, because we regard them as equal on this factor, cf. Big Bend Broadcasters, 96 FCC 2d 166, 172 (Rev. Bd. 1983), rev. denied, FCC 84-645, released December 26, 1948; and, in any event, this factor is entitled to only minor

weight. Id.

[14] On May 7, 1986, Jarad filed comments on a petition for leave to amend allegedly filed by Spectron "on or about April 28, 1986." However, our search of Commission files reveals no such filing. Accordingly, we have no Spectron petition for leave to amend before us upon which to rule.

[15] A comment on Jarad's June 27, 1986, Contingent Motion to Re-open and Enlarge is appropriate. In light of our decision herein, it is not necessary to reach the merits of Jarad's allegations raised in its Motion. However, we note that Jarad has supplied copies of a "newspaper" article from the June 1986 issue of The Women's Record, as well as a press release dated April 28, 1986 on Spectron letterhead. The news article depicts Spectron's President, and former FCC attorney, Angela Shaw, sitting in front of broadcast studio equipment and describes her as "own[ing] and operat[ing] WLIR-FM, 92.7." The test of the article describes her as "general manager of L.I. radio station WLIR-FM." The press release, which was obviously prepared by Spectron, invites the public to attend a "gala celebration" to commemorate the award of "a permanent construction permit" to Spectron for "WLIR, 92.7 FM." Without passing on the merits of Jarad's unopposed allegations, we do note that such conduct is at the very least inappropriate.

APPENDIX C

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of

JARAD BROADCASTING COMPANY, INC. Garden City, New York	MM DOCKET NO. 84-301 File No.BPH-830325AC
SPECTRON BROADCASTING CORPORATION Garden City, New York	MM DOCKET NO. 84-8-3 File No.BPH830516AK
WESTPLEX BROADCASTING COMPANY Garden City, New York	MM DOCKET NO.84-305 File No. BPH830714AE

NORTH SHORE BROADCASTING Garden City, New York	MM DOCKET NO. 83-306 File No.BPH-830714AF
DECEMBER VENTURES, INC. Garden City, New York	MM DOCKET NO. 84-307 File No.BPH-830714AG
WINK RADIO, INC. Garden City, New York	MM DOCKET NO. 84-308 File No.BPH-830714AH
FONIC BROADCASTING CO. Garden City, New York	MM DOCKET NO. 84-309 File No.BPH-830714AI

MID-ISLAND
BROADCASTING, INC. MM DOCKET NO. 84-310
Garden City,
New York File No.BPH-830714AK

McCOMAS
BROADCASTING
CORPORATION MM DOCKET NO. 84-312
Garden City,
New York File No.BPH-830714BF

For a Construction Permit
for a New FM Station

MEMORANDUM OPINION AND ORDER

Adopted: December 16, 1986; Released December 23, 1986

1. The Review Board has under consideration the petitions for reconsideration filed on November 17, 1986

by Garden City Broadcasting, Inc. (GCB) and WINK Radio, Inc. (WINK) and GCB's motion to enlarge issues filed on the same date. In our Decision released October 16, 1986, 1 FCC Rcd 181, 61 RR 2d 389 (Rev. Bd. 1986) we granted the application of Jarad Broadcasting Company Inc. (Jarad) for permanent authority to construct an FM broadcast station to operate on Channel 224 at Garden City, New York, after finding Jarad's application to be comparatively superior. We shall deny the petitions for reconsideration because they seek merely to reargue matters already addressed and resolved in our Decision. That is, insofar as GCB and WINK both attack the Board's analysis of the qualitative enhancement factors supporting Jarad's integration preference, as well as our treatment of WINK's coverage advantage, these matters were fully considered at note 3 and paras. 23, 25, 46, 48-49, 53 of our Decision and

will not be revisited. See WWIZ, Inc., 37 FCC 685, 686 (1984), aff'd sub nom. Lorain Journal Co. v. FCC, 351 F.2d 824 (D.C. Cir.) cert den., 383 U.S. 967 (1966); see also Clay Television, Inc. 98 FCC 2d 510 (Rev. Bd. 1984), rev. den., FCC 85-356, released July 12, 1985.

2. GCB's motion to enlarge issues seeks the specification of a misrepresentation issue against Jarad, and a reopening of the record in this proceeding, on the grounds that Jarad principal Ronald J. Morey misrepresented his claimed status as a member of a minority group (American Indian). We shall deny GCB's motion. First, the materials relied on by GCB to support its motion were available to it at the hearing; yet, it made no effort to seek enlargement of the issues at the time to explore any misrepresentation. Thus, its request now is incurably late. See Kaye-Smith Enterprises, 98 FCC 2d 675,

685-6, 56 RR 2d 252, 260 (Rev. Bd. 1984). Second, in our Decision, we awarded Jarad no minority enhancement credit because Jarad had failed to meet its burden of proving Mr. Morey's status as an Indian. 1 FCC Rcd at 182-183, 61 RR 2d at 398-399. Specifically, we stated in para. 10 of our Decision that "We do not hold that the record establishes that Morey is not an Indian but only that it does not establish that he is an Indian.: It does not automatically follow, however, that Mr. Morey's claim amounted to a misrepresentation or that he intended to mislead the Commission, and GCB has failed to demonstrate prima facie that an issue is warranted. No evidence whatever has been offered to show that Mr. Morey does not in fact believe that he is of Indian ancestry. See Garrett, Andrews and Letizia, Inc. 86 FCC 2d 1172, 1175-7, 49 RR 2d 1001, 1004-5 (Rev. Bd. 1981), aff'd in pertinent part, 88 FCC 2d 620, 50 RR 2d 802 (1981).

3. ACCORDINGLY, IT IS ORDERED, That the motion to accept late-filed reply filed on December 15, 1986 by WINK Radio, Inc. IS GRANTED, and the consolidated reply IS ACCEPTED: and

4. IT IS FURTHER ORDERED, That the motions for certification and for expedited disposition filed on November 20 and 24, 1986 by Jarad Broadcasting Company, Inc. ARE DISMISSED as moot, and the petitions for reconsideration filed on November 17, 1986 by Garden City Broadcasting, Inc. and WINK Radio, Inc. and the motion to enlarge issues filed on November 17, 1986 by Garden City Broadcasting, Inc. ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

APPENDIX D

Before the

Federal Communications Commission FCC 87-312

Washington, D.C. 20554 37191

In re Applications of	)	
	)	
JARAD BROADCASTING	)	
COMPANY, INC.	)	MM DOCKET NO. 84-301
Garden City, New York	)	File No. BPH-830325AC
	)	
S' ECTRON BROADCASTING	)	
CORPORATION	)	MM DOCKET NO. 84-303
Garden City, New York	)	File No. BPH-830516AK
	)	
GARDEN CITY	)	
BROADCASTING, INC.	)	MM DOCKET NO. 84-304
Garden City, New York	)	File No. BPH-830713AQ
	)	
WESTPLEX BROADCASTING	)	
COMPANY	)	MM DOCKET NO. 84-305
Garden City, New York	)	File No. BPH-830714AE
	)	

NORTH SHORE	)	
BROADCASTING	)	MM DOCKET NO. 84-306
Garden City, New York	)	File No. BPH-830714AF
	)	
DECEMBER VENTURES,	)	
INC.	)	MM DOCKET NO. 84-307
Garden City, New York	)	File No. BPH-830714AG
	)	
WINK RADIO, INC.	)	MM DOCKET NO. 84-308
Garden City, New York	)	File No. BPH-830714AH
	)	
FONIC BROADCASTING CO.	)	MM DOCKET NO. 84-309
Garden City, New York	)	File No. BPH-830714AI
	)	
McCOMAS BROADCASTING	)	
CORPORATION	)	MM DOCKET NO. 84-312
Garden City, New York	)	File No. BPH-830714BF
	)	
For Construction Permit	)	
for a New FM Station	)	

MEMORANDUM OPINION AND ORDER

Adopted: October 2, 1987; Released: October 5, 1987

By the Commission:

1. This proceeding involves mutually exclusive applications for a new FM broadcast station at Garden City, New York, to replace the deleted facilities of WLIR (FM). In a Decision, 1 FCC Rcd 181, recon. denied, 1 FCC Rcd 1267 (1986), the Review Board granted the application of Jarad Broadcasting Company (Jarad). Now before the Commission are Applications for Review filed November 17, 1986 by Spectron Broadcasting Corporation (Spectron), Westplex Broadcasting Company (Westplex), North Shore Broadcasting (North Shore), Fonic Broadcasting Co. (Fonic), and McComas Broadcasting Corporation (McComas); and on January 23, 1987, by Garden City Broadcasting, Inc. (GCB) and WINK Radio,

Inc. (WINK); and a Contingent Application for Review, filed November 17, 1986 by Jarad. 1/ Also before the Commission are Joint Petitions for Approval of Settlement Agreements and for Prompt Resolution filed March 9, 1987 by Jarad, GCB, McComas, North Shore and WINK, and Supplemented on March 11, 1987 by Jarad; and filed July 10, 1987 by Fonic, Westplex and Jarad. 2/ On August 4, 1987 Jarad filed a Motion to Expedite, and it submitted Supplements thereto on September 22, 1987 and September 30, 1987. The Joint Petitions ask the Commission to approve the grant of Jarad's application, and the dismissal of the applications for review and the applications for construction permits filed by each of the remaining applicants, with the exception of Spectron. Thus, all of the remaining applicants, except Spectron, have entered into settlement agreements contingent upon our action on Spectron's Application for Review.

2. Spectron's Application for Review: Spectron fails to raise issued which would warrant modification of the Board's comparative evaluation of the applicants in this proceeding. Spectron, however, raises two matters which merit further comment. The Review Board dismissed a Contingent Motion to Reopen and Enlarge Issues, with respect to Spectron, filed June 27, 1986 by Jarad. The petition was predicated on a newspaper article and a press release on Spectron's letterhead distributed after the release of the Initial Decision, representing Spectron's principal as owning, operating and serving as general manager of Station WLIR (FM). Although the Board never ruled on the merits of the petition, it said "that such conduct is at the very least inappropriate." 1 FCC Rcd at 192 n.15. The Board's comment will be deleted because it is not based on record evidence. We disagree with Spectron that this statement

constitutes prejudicial error, however. To the contrary, the Board's statement is not decisionally significant. Thus, our action herein is not predicated in any respect on Jarad's Contingent Motion to Reopen and Enlarge Issues.

3. On May 23, 1983, Spectron entered into a loan agreement, which provided that notes securing a loan to Spectron could be redeemable for either noting or non-voting stock. The notes actually executed were redeemable only for non-voting stock. The Board, nevertheless, held that the loan agreement diluted the control of Spectron's principal, Angela Shaw, over the applicant. Spectron argues that the Board failed to consider fully the fact that the notes as issued were only redeemable for preferred stock. The Board's decision does not adequately explain why the executed notes cannot be relied on to establish that they can only be redeemed for preferred stock.

We find this to be harmless error, however, for the notes are not decisionally significant in view of other aspects of the Board's Decision diminishing the integration credit awarded Spectron. See 1 FCC Rcd at 183-84 ¶ ¶14-18.

4. The Settlement Agreements: Spectron opposes the settlement agreements on the grounds that the dismissing applicants have filed for review; that the Commission cannot contingently ignore the comparative merits of their applications; and that the proposed settlement agreements, therefore, will not hasten the end of this litigation. Spectron's arguments are unsupported. The procedure requested here was specifically approved in Gilbert Broadcasting Corp., 91 FCC 2d 450 (1982). Gilbert was a four party proceeding, in which two of the applicants (Sound Radio, Inc. and Gilbert) entered into a settlement. The Commission approved the settlement and

granted Sound's application, finding that it was comparatively superior to the two nonsettling applicants and that there was no need to consider Gilbert's comparative qualifications. 91 FCC 2d at 467. Spectron argues that Gilbert is inapposite, because in Gilbert, the Commission considered the comparative qualifications of the dismissing applicant. Spectron, however, misreads Gilbert. The language cited by Spectron, 91 FCC 2d at 464-65, is merely a summary of the ALJ's findings. There is nothing to indicate that the Commission otherwise relied on those findings in approving the settlement, and the decision explicitly states that Gilbert's comparative qualifications were not considered. Id at 468 n.58. No useful purpose would be served by considering applications for review filed by parties that are prepared to have their applications for review and their applications for construction permits

dismissed. 3/

5. Contrary to Spectron's assertions, the settlement agreements will serve the public interest. They will result in the licensing of a qualified applicant, simplify the resolution of this proceeding, obviate consideration of the applications for review filed by the dismissing applicants, and facilitate the authorization of a permanent licensee of the Garden City FM station. The parties submitted copies of the settlement agreements and declarations from each party to the agreements certifying that their applications were not filed for the purpose of entering into or carrying out a settlement agreement. The Joint Petitions fully comply with the provisions of 47 U.S.C. §311(c) and 47 C.F.R. § 73.3525 which govern settlement agreements. Finally, having denied Spectron's Application for Review, it has no further rights with respect to this matter. In view of all

these circumstances, the public interest will be served by a grant of the Joint Petitions and approval of the proposed settlement agreements.

6. ACCORDINGLY, IT IS ORDERED, That the Application for Review filed November 17, 1986 by Spectron Broadcasting Corporation IS GRANTED to the extent that the Board's Decision, 1 FCC Rcd 181 (1986), has been modified as reflected in paragraphs 2 and 3, supra and IS DENIED in all other respects.

7. IT IS FURTHER ORDERED, That the Joint Petition for Approval of Settlement Agreements and for Prompt Resolution, filed March 9, 1987 by Jarad Broadcasting Company, Inc., Garden City Broadcasting, Inc., North Shore Broadcasting, WINK Radio, Inc., and McComas Broadcasting Corporation; and the Joint Petition for Approval of Additional Settlement Agreements and for Prompt Resolution filed by July 10, 1987 by Jarad

Broadcasting, Inc., Fonic Broadcasting Company and Westplex Broadcasting Company ARE GRANTED and the attached settlement agreements ARE APPROVED: and the Motion to Expedite filed August 4, 1986 by Jarad Broadcasting, Inc., IS DISMISSED as moot. 4/

8. IT IS FURTHER ORDERED, That the Applications for Review, filed on November 17, 1986 by Westplex Broadcasting Company, North Shore Broadcasting, Fonic Broadcasting Co., and McComas Broadcasting Corporation, and on January 23, 1987 by Garden City Broadcasting, Inc. and WINK Radio, Inc.; the Contingent Application for Review filed November 17, 1986 by Jarad Broadcasting Company, Inc.; and the Motion to Strike Opposition to Application for Review, filed December 23, 1986 by McComas Broadcasting Corporation, ARE DISMISSED as moot.

9. IT IS FURTHER ORDERED, That the Motion for Leave to File Supplement to Opposition filed April 8, 1987 by Spectron

Broadcasting Corporation IS GRANTED.

10. IT IS FURTHER ORDERED, That the application filed by Jarad Broadcasting Company, Inc. (File No. BPH-830325AC) IS GRANTED; the application filed by Spectron Broadcasting Corporation (File No. BPH-830516AK) IS DENIED: and the applications filed by Garden City Broadcasting, Inc. (File No. BPH-830713AQ), Westplex Broadcasting Company (File No. BPH-830714AE), North Shore Broadcasting (File No. BPH-830714AF), WINK Radio, Inc. (File No. BPH830714AH), Fonic Broadcasting Co. (File No. BPH-830714AI) and McComas Broadcasting Corporation (File No. BP-0830714BF) ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

1/ Also before the Commission are oppositions filed December 2, 1986 by Jarad,

GCB and Westplex, February 6, 1987 by WINK, and February 9, 1987 by Jarad, GCB and Westplex. On December 23, 1986, McComas moved to strike GCB's opposition, and on January 6, 1987, GCB filed an opposition to the motion to strike. On January 15, 1987, Jarad filed a Contingent Motion to Re-Open the Record and Enlarge Issued against Spectron, which will be dismissed as moot in light of our action herein. December Ventures, Inc. did not file an application for review and, therefore, the Board's denial of its application is final.

2/ Also under consideration are oppositions to the joint petition, filed April 1, 1987 by Fonic and April 7, 1987 by Spectron. On April 8, 1987, Spectron moved to supplement its opposition to the joint petition. Replies to the Oppositions were filed April 17, 1987 by Jarad. Since Fonic is now a party to the settlement agreement, its opposition is moot.

3/ Spectron also argues that the Joint Petitions should be denied because Spectron is not a party to the settlements and because of the alleged interest of Elton Spitzer in one of the applicant in this proceeding. Spitzer is a principal of Phoenix Media Corp., which is currently operating WLIR (FM) pursuant to a Special Temporary Authorization. Spectron argues that Spitzer has an interest in "one" of the parties to the settlement and that Jarad's failure to settle with Spectron is calculated to prolong the proceeding and thereby enable Spitzer to maintain his interim operation. Spectron's contentions are totally without merit. Having already concluded that Spectron's Application for Review should be denied, the fact that Spectron is not a party to the proposed settlements has no bearing on the question

of whether approval of the agreements will serve the public interest. Spectron's contentions involving Elton Spitzer provide no facts indicating that he has an ownership interest in Jarad, or that he has a specific interest in any other applicant. Finally, Spectron's attempt to attribute misconduct to Jarad based on these allegations is rejected as being speculative and otherwise unsupported. Spectron has raised no substantial and material question of fact or any other matter warranting further consideration at this time.

4/ Consistent with the priority of other matters and the efficient disposition of the Commission's business, we have given expeditious consideration to the pleadings filed in this proceeding.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-1635 September Term, 1988

Spectron Broadcasting Corporation,
Appellant

v.

Federal Communications Commission,
Appellee

Jarad Broadcasting Company, Inc.
Intervenor

APPEAL FROM AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

BEFORE: STARR, WILLIAMS and SENTELLE,
Circuit Judges

J U D G M E N T

This cause came on to be heard on the notice of appeal from an order of the Federal Communications commission, and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. See D.C. Cir. R. 14(c). On consideration thereof, it is

ORDERED and ADJUDGED, by the Court,

that the order of the Federal Communications Commission on appeal herein is hereby affirmed, for the reasons set forth in the accompanying memorandum. It is

FURTHER ORDERED, by the Court, sua sponte that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. R. 15 (August 1, 1987). This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

Per Curiam

For the Court

Constance L. Dupre

Clerk

No. 87-1635 - Spectron Broadcasting Corp. v. Federal Communications Commission

MEMORANDUM

This is an appeal from the FCC's grant to Jarad Broadcasting Company of a permit to construct an FM radio station in Garden City, New York. Jarad's principal competitor, Spectron Broadcasting Corp., seeks to overturn the FCC's decision on a variety of grounds. The principal issue, however, is whether the FCC properly applied its long-standing policy with respect to integration of licensee ownership and station management. See Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d 393 (1965).

I

The FCC chooses among competing license applicants based upon two principal criteria: diversification of mass media

control and best practicable service, the criterion at issue in this case. Id. at 394. The FCC evaluates applicants' service primarily upon their quantitative integration credit, an assessment which represents the "full time participation in station operation by owners." Id at 395. Certain attributes of participating owners -- e.g., residence in the community, belonging to a racial minority group, being female, having broadcast experience, and civic leadership -- may also lead to awards of qualitative enhancement credit; however, such qualitative assessments can be determinative only when proposals differ insignificantly in quantitative credit. See, e.g., New Continental Broadcasting Co., 88 F.C.C. 2d 830 (Review Board 1981), remanded on other grounds, 93 F.C.C. 2d 1275 (1983).

Partially in recognition of the difficulty of financing a license

application and station, the Commission excludes truly passive investors from its integration calculation. Although the Commission usually refers to the applicant's legal structure to determine which owners will control the station (and thus be counted in the integration calculation), the FCC will focus instead on who actually controls the station's day-to-day operation if the record sufficiently indicates that control is inadequately reflected in the formal corporate organization. See KIST Corp., 102 F.C.C. 2d 288 (1985), aff'd sub nom. United Am. Telecasters, Inc. v. F.C.C., 801 F.2d 1436 (D.C. Cir. 1986)(table), cert. denied, 107 S. Ct. 2181 (1987); Signal Ministries, Inc., 104 F.C.C. 2d 1481 (Review Board 1986), aff'd sub nom. Adelphi Broadcasting Corp. v. F.C.C., 838 R.2d 571 (D.C. Cir. 1988)(table). It is the Commission's decision to look beyond Spectron's formal corporate structure (and

the conclusions the FCC then reached) that is at issue in this case.

II

At the time of the exhibit exchange, Spectron's revised license application set forth a bifurcated capital structure. All voting stock (31 shares) was held by Angela Shaw, an attorney who had previously served on the staff of the FCC (then under the chairmanship of Benjamin Hooks). Initial Decision at 7, § 25, J.A. at 23; Brief for Appellant at 7. The nonvoting stockholders included: Roland Davis, a member of numerous minority and community organizations (owner of 22 of 64 shares of nonvoting stock); Briding Newell, a local resident involved extensively in civic activities (15 shares); Frances Hooks, spouse of the former FCC Chairman and a leader in the black community (5 shares); James Shuart, president of Hofstra

University (2 shares); and LuNell Anderson (2 shares). Initial Decision at 8-10, ¶ ¶ 25, 27-31, J.A. at 24-26. To round out the ownership arrangements, Ms. Shaw holds 18 nonvoting shares, in addition to her voting shares. Id. at 7, ¶ 25, J.A. at 23. Shaw, Newell, Anderson, and Hooks are black women, and Davis is also black. Spectron Exhibit 1, at 2, J.A. at 579 (corrected supp. app.). Mr. Shaw proposed to work at the station full time; Mr. Davis, 10-2 hours per week; and Ms. Newell approximately 10 hours per week. Initial decision at 9-10, ¶ ¶ 28-30, J.A. at 25-26.

The Administrative Law Judge accepted this bifurcated corporate structure (and thus Ms. Shaw's sole controlling ownership of Spectron) and awarded Spectron 100 percent full-time integration credit. Id at 43, ¶ 205, J.A. at 59. Based upon Ms. Shaw's background, the ALJ awarded Spectron 100 percent qualitative enhancement credit

for past and future local residence; civic participation; minority ownership; female ownership; and some broadcast experience. Id. Although the ALJ awarded several other applicants (including Jarad) 100 percent full-time integration credit and various enhancement credits, he favored Spectron's application because of its superior qualitative enhancements. Id at 44, ¶ 206, J.A. at 60.

Faced with various exceptions to the Initial Decision, the Review Board diminished Spectron's integration credit and awarded the license to Jarad, the runner-up in the Initial Decision. Decision, 1 F.C.C. Rcd at 185, 190, ¶ ¶ 21, 58, J.A. at 65, 70. The Review Board based its integration calculation upon actual control of the station as shown in the record, rather than the formal division of voting from nonvoting stock. In particular, the Review Board relied upon the undisputed testimony that

two of the nonvoting stockholders (Mr. Davis and Ms. Newell) would devote significant time to directing the stations' operation and policies. Id at 184, ¶ 18, J.A. at 64. Specifically, under Spectron's proposed organization, Mr. Davis and Ms. Newell would join Ms. Shaw in serving on the station's board of directors, with each person having one vote. In addition, both would "be active in managing the station on a daily basis through their participation on three policy-making committeed." Id. at 185, ¶ 21, J.A. at 65. The Review Board focused in part upon Mr. Davis's promise to devote 10-20 hours per week, and Ms. Newell's to devote approximately 10 hours per week, to management and policy-making functions. Id. at 184, ¶ 18, J.A. at 64.

Although the Review Board considered the foregoing involvement a "sufficient" basis for reducing the integration credit, id., Ms. Shaw's testimony about the nature

of her application and extent of control over the company was seen by the Board as buttressing its finding that she would not in fact wield exclusive control. Id at 183-184, ¶ ¶ 14-16, J.A. at 63-64. The eleventh-hour creation of a separate class of stock, the lack of independent business reason to separate voting from nonvoting stock, and the participation of nonvoting members in the development of the application, the Board reasoned, further confirmed its conclusion that Ms. Shaw did not sufficiently retain sole control over Spectron and that the Board should therefore disregard Spectron's formal corporate structure. Id. at 184, ¶ ¶ 16-17, J.A. at 64.

Based on these findings, the Review Board held that Spectron's formal corporate structure did not reflect "where true ownership and control rests." Id at 185, ¶ 21, J.A. at 65. Having found that nonvoting

stockholders would participate significantly in Spectron's management and control, the Board concluded that the applicant was not entitled to the 100 percent integration credit based upon Ms. Shaw's sole control and proposed full-time work. The Board declined to decide whether Spectron was entitled to full-time integration credit reflecting only Ms. Shaw's equity holdings (52 percent) or to no credit at all (the amount which would be due an unreliable proposal), but simply concluded that "Spectron is not entitled to credit approaching the 100 percent awarded to other applicants, and is, in essence, eliminated from further comparative contention." Id. The Review Board later denied motions for reconsideration of its Decision. Jarad Broadcasting Co., 1 F.C.C. Rcd at 1267.

Upon application for review, the Commission upheld the Review Board's disposition. Jarad Broadcasting Co., 2

F.C.C. Rcd at 6080-81, ¶ ¶ 2, 10, J.A. at 76, 78. The Commission directed that the Review Board's Decision be modified to omit one comment about Spectron's behavior and one basis for disregarding the applicant's formal legal structure in awarding integration credit. Id at 6080-81, ¶ ¶ 2-3, J.A. at 76-77. The FCC deemed both of these mistakes harmless error. Id.

III

On the principal issue, we are satisfied that the FCC correctly applied its well-settled policies with respect to integration. On this record, the Commission could reasonably conclude that two nonvoting shareholders (Newell and Davis) would in fact share with Ms. Shaw significant responsibility in the actual management and operation of the proposed station. In particular, the Commission justifiably relied on the findings that both Ms. Newell

and Mr. Davis would, first, each spend at least 10 hours per week involved in station affairs; second, serve on committees with significant responsibilities for shaping basic station policies and operation; and, third, actively participate in management affairs as members of the three-person board of directors. See Decision, 1 F.C.C. Rcd at 184-185, ¶ ¶ 18, 21, J.A. at 64-65. The Commission's additional stated grounds for its decision further justify its disposition. See id. at 183-184, ¶ ¶ 14-17, J.A. at 63-64.

In view of these findings, prior cases fully support the Commission's holding. The Commission's integration policy calls for the FCC to disregard truly passive investors who exercise no significant control over the applicant. See Anax Broadcasting, Inc., 87 F.C.C. 2d 483 (1981); Bradley, Hand, and Triplett, 89 F.C.C. 2d 657 (Review Board 1982). The Commission also looks beyond the

applicant's formal corporate structure to determine actual control of the applicant when circumstances warrant. See KIST CORP., 102 F.C.C. 2d at 290-293; Signal Ministries, Inc., 104 F.C.C. 2d at 1494-97. The Commission "will not hesitate to discredit the integration proposals of applicants where [it is] presented with convincing evidence that limited partners or non-voting shareholders are or will be in fact exercising influence or control over the ongoing business." Victory Media, Inc., 3 F.C.C. Rcd 2073, 1074-75 (1988).

We can find no relevant distinction between the Commission's action or reasoning in this case and its reasoning and disposition in Signal Ministries, 104 F.C.C. 2d at 1481, and cases relied on in that decision. In Signal Ministries, the nonvoting stockholders had, among other things, significantly participated in discussions of corporate affairs and

planned to assume prominent policy-setting and day-to-day management roles at the station. Id at 1495. The Review Board disregarded the formal corporate structure and extended its integration analysis beyond voting shareholders because "the participation, both past and proposed, of the non-voting shareholders is so thoroughly intertwined with the participation of the voting stockholders." Id at 1496. Based upon a proposed corporate structure which was at odds with the participation of nominally nonvoting shareholders, the Board in Signal Ministries reduced the integration credit at least by half. Id. at 1497. The Board also restricted the integration calculation to those shareholders proposed for credit before the "B" cutoff date. Id at 1496=97.

Spectron argues that the Commission's action here is quite different from that in Signal Ministries and is indeed inconsistent

with two other commission decisions, namely Birmingham Family Television, Inc., 91 F.C.C. 2d 348 (Review Board 1982), and Greater Wichita Telecasting, Inc., 90 F.C.C. 2d 1046 (Review Board 1982), modified 96 F.C.C. 2d 984 (1984). Not so. Birmingham Family and Greater Wichita may bear upon whether equity owners who are involved in management less than full time might be entitled to residual integration credit, but neither case undermines the Commission's quantitative integration calculation, which is the dispositive issue in this case. Indeed, both cases are fully consistent with that disposition. Birmingham Family did deem local residence of eight (out of fifteen) directors worthy of "slight credit" of "minor significance.'" 91 F.C.C. 2d at 353 (quoting Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d at 396). But as to our case, any minority enhancement awarded by virtue of Ms. Newell's and Mr.

Davis's involvement, by analogy, would not affect the disposition of the case; indeed, the analogy buttresses the Commission's treatment of the dispositive issue to the extent it supports the conclusion that Ms. Newell and Mr. Davis were essentially participating owners. Birmingham Family also recognized that directors who (like Mr. Davis and Ms. Newell) would devote 10-20 hours per week on station work were not entitled to full-time or even part-time integration credit "because [they] will each spend insufficient time on station affairs." Id. (citing Midwest Broadcasting Co., 70 F.C.C. 2d 1489, 1495 (Review Board 1979).

Greater Wichita likewise provides no support for Spectron's position. Although appellant suggests that the Commission's denial of credit for involvement of passive investors in Greater Wichita conflicts with the Commission's actions in this case, Reply Brief for Appellant at 14-15, that is just

not so. Because in Greater Wichita the formal corporate structure was not belied by who actually controlled the applicant and did not shield a contested integration proposal (indeed, the decision awarded no integration credit), the decision merely restates the general rule that truly passive investors are included in the integration calculation. That is, because the legal structure assured no integration credit which the limited partners' management activities (which were far less than those of Ms. Newell and Mr. Davis) might undermine or call into question, Greater Wichita does not suggest that those management activities by nominally passive investors cannot invalidate a corporate structure that does not reflect actual control.[1]

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1 Appellant apparently also employs the Review Boards' decision in Greater Wichita to argue that the activities of noncontrolling shareholders should entitle the applicant to residual integration credit. Brief for Appellant at 28.

In sum, we can discern in the Commission's disposition no agency infidelity to precedent or unreasoned application of policy to the facts of the case. Cf. Greater Boston Television Corp. v. FCC, 444 F. 2d 841 (D.C. Cir. 1970), cert. denied,

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However, the Commission reversed that determination, denying any such credit. See Greater Wichita Telecasting, Inc., 96 F.C.C. 2d at 989.

Additionally, in view of its integration calculation in this case, the FCC had no need to consider granting (much less actually to grant) any such enhancement credit. Because the Commission's quantitative integration calculation rendered Spectron's application vastly inferior to other applications, any slight enhancement credit, or even marginal integration credit, that Spectron may have deserved was simply irrelevant to the outcome of this case. In fact, Newell and Davis's activities entitled Spectron to no additional credit, because the bar upon changes in integration applications existed, see Signal Ministries, Inc., 104 F.C.C. 2d at 1496; because they would devote insufficient hours per week to station affairs, see Midwest Broadcasting Co., 70 F.C.C. 2d at 1495; and because, if actually passive investors, they were not to be included in the integration calculation at all, see Anax Broadcasting, Inc., 87 F.C.C. 2d at 488.

403 U.S. 923 (1971).

IV

In addition to its principal attack, Spectron also contests the FCC's failure to reconsider various attacks upon Jarad's application; charges that the Commission's hostility to Ms. Shaw impermissibly motivated its decision; and alleges deprivation of Spectron's investors' due process rights.

Spectron seeks to revive several challenges to the Commission's grant of a permit to Jarad. However, Spectron did not appeal the Review Board's rejection of these challenges to the Commission. See Application for Review of Spectron Broadcasting Corp. for Review of Review Board's Decision (Nov. 17, 1986), J.A. at 465-75. Because the Commission has not considered these issues, they are not properly before us. See 47 U.S.C. § 405;

Rogers Radio Communications Serv. v. FCC, 751 F. 2d 408, 413 n.14 (D.C. Cir. 1985).

Spectron also argues that the Commission's impermissible hostility to Ms. Shaw led to denial of the application. First, Spectron alleges that the Commission applied an improperly high standard in evaluating Ms. Shaw's testimony and application because she had previously been an FCC attorney. We disagree. The passing reference to Ms. Shaw's former service, Decision 1 F.C.C. Rcd at 183, ¶ 15, J.A. at 63, appears amidst a long discussion of how Ms. Shaw appeared to be unfamiliar with the application, especially with the details that supposedly established her sole control of Spectron for integration purposes. That reference undermines neither the Commission's conclusions as to the extent of Ms. Shaw's control nor the independent basis for its decision, namely the participation of nominally nonvoting shareholders in

station affairs.

Second, Spectron alleges that the FCC denied its application because it was motivated by hostility to Ms. Shaw's membership in a racial minority group and to Spectron's claims to minority enhancement credits. There is no evidence whatever of this; despite its serious charges, Spectron has offered not a shred of evidence of improper motivation underlying Commission policies or treatment of Spectron. Indeed, the gist of Spectron's grievance appears to be that the FCC did not respond to the minority membership of many of Spectron's shareholders by subordinating its well-established integration rules to the concerns that underlie the minority enhancement credit. But there is simply no ground in law to warrant our tearing asunder the Commission's long-standing policy with respect to integration of ownership and management.

Finally, Spectron broadly alleges a host of violations of various constitutional rights. The burden of this argument seems to be that by disregarding Spectron's proffered corporate structure, the FCC ran roughshod over various constitutional rights of individuals associated with Spectron. These contentions are entirely without merit. The FCC grounded its conclusions on the sworn testimony of Spectron shareholders themselves; that is, Ms. Newell and Mr. Davis testified that they would carry out significant Spectron management duties and decisions affecting the licensee. By crediting this testimony, the FCC obviously worked no due process or equal protection violation. To suggest the contrary is frivolous. Nor do the Commission's policies in any manner chill associational liberties of those interested and concerned about Spectron. Indeed, it is abundantly clear that Spectron could have structured its

affairs either to include those involved in the day-to-day management of the station in its integration and enhancement calculations, or to limit passive investors to non-management roles and functions.

V

Prior to oral argument and more than six weeks following appellant's filing of the joint appendix, Jarad filed a "Motion to Strike and to Correct Portions of the Joint Appendix." That motion also requested the court to order sanctions against Ms. Shaw and (or) Spectron. Jarad contended that appellant had failed to include certain material that Jarad and the FCC had designated for inclusion in the joint appendix and had submitted versions of other designated Jarad exhibits that grossly deviated from the exhibits filed with the Commission.

By order dated August 29, 1988, we granted Jarad's motion to strike and

directed the filing of the corrected joint appendix, which as in fact completed. In addition, Ms. Shaw filed two affidavits, one from Ms. Regina Robinson, a sometimes employee of Spectron, and the other from Ms. Shaw herself.[2] The affidavits' burden was that Ms. Shaw had directed (and then relied upon) Ms. Robinson to secure the pertinent materials for inclusion in the original joint appendix. The affidavits indicate that when the errors in the joint appendix were brought to Ms. Shaw's attention, her schedule, including extensive travel commitments, led her to rely once again upon the efforts of Ms. Robinson to correct the appendix. In the following weeks, no corrections were made, until Jarad's motion and this court's order finally prompted the

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[2] Ms. Shaw, Spectron's principal, has been the counsel of record in this proceeding. However, Spectron was represented by outside counsel before the Commission in various FCC proceedings.

filing of a corrected joint appendix.

We do not lightly countenance an attorney's failure to comply with the requirements of Rule 30, F.R.A.P. The integrity of the appellate process depends upon the accuracy and completeness of the appendix, and, as this case illustrates, judicial economy requires that agreements among parties regarding materials to be included in the appendix be fulfilled. In our view, Ms. Shaw's discharge of her duties imposed by Rule 30 fell below acceptable standards. We are nonetheless unprepared to conclude, on the record before us, that sanctions should be imposed. We do, however, admonish counsel for what appears clearly to have been a cavalier attitude toward her responsibilities as an officer of the court.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

SPECTRON BROADCASTING CORP.
PETITIONERS,

v.

FEDERAL COMMUNICATIONS COMMISSION,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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